

2009

# State of Utah v. Randy Fetch Jeffs : Brief of Appellant

Utah Supreme Court

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David Drake; Attorney for Appellant.

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**IN THE SUPREME COURT OF THE STATE OF UTAH**

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STATE OF UTAH,	)	Case No. 20090737 SC
	)	
Plaintiff/Appellee,	)	
	)	
vs.	)	
	)	
RANDY FETCH JEFFS,	)	
	)	
Defendant/Appellant	)	

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**INITIAL BRIEF OF APPELLANT**

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**APPEAL FROM THIRD DISTRICT COURT OF THE STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT  
JUDGE WILLIAM W. BARRETT**

---

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INITIAL BRIEF OF APPELLANT

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JURISDICTION

This Court has jurisdiction pursuant to § 78A-3-102(3)(h).

ISSUES PRESENTED AND STANDARD OF REVIEW

1. As an indigent, whether Jeffs has a right to keep the counsel of his choice and entitlement to defense resources under the act without having to give up the private attorney he retained and be forced to accept LDA counsel.

Standard of Review: Statutory interpretation by the Trial Court is reviewed for correctness. *State v. Burns*, 2000 UT 56, ¶ 15, 4 P.3d 795.

Citation to Record: Raised in Motions filed by defendant (R.143-145, 219-243, and in petition for interlocutory appeal.

2. Whether the Utah Legislature Neither Attempted Nor Achieved Overturning this Court's Ruling in *State v. Burns*.

Standard of Review: Statutory interpretation by the Trial Court is reviewed for

correctness. *State v. Burns*, 2000 UT 56, ¶ 15, 4 P.3d 795. Appellate review of a trial court's determination of the law is reviewed for correctness. *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Citation to Record: Raised for the first time on appeal.

3. Whether Denying Indigent Defendants Defense Resources Would Catastrophically Undermine Pro Bono Representation By Private Attorneys in Utah

Standard of Review: Statutory interpretation by the Trial Court is reviewed for correctness. *State v. Burns*, 2000 UT 56, ¶ 15, 4 P.3d 795. Appellate review of a trial court's determination of the law is reviewed for correctness. (Also, the effect of a given set of facts is a question of law to be reviewed for correctness.) *State v. Pena*, 869 P.2d 932, 936 (Utah 1994).

Citation to Record: Raised for the first time on appeal.

### **PRESERVATION OF ISSUES**

The issues set forth above were originally raised by Jeffs in his Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witness at State Expense (R.143+145), Supplement to Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witness at State Expense (R.219-243), Jeffs' Reply to State's Response Re Indigency (R.181-190), the hearing before the trial court resulting in Findings of Fact, Conclusions of Law, and Order Declaring Defendant Indigent But Denying Defendant's Motion for Funds (R.280-283), and filing a Petition for Permission to Appeal from Interlocutory Order, subsequently granted by the Utah Supreme Court.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following determinative provisions are attached as *Addendum A*.

United States Constitution, Amendment VI.

Utah Code Ann., § 77-32-101

Utah Code Ann., § 77-32-301

Utah Code Ann., § 77-32-302

Utah Code Ann., § 77-32-303

Utah Code Ann., § 76-5-202

Utah Rules of Criminal Procedure, Rule 15

Utah Rules of Professional Conduct, #s 1.1, 1.3, 1.16, 3.2, 6.1, and 6.2

## STATEMENT OF THE CASE

Defendant was charged with four 1<sup>st</sup> degree felonies pursuant to § 76-5-202, Utah Code Ann., “Attempted Criminal Homicide, Aggravated Murder”. R.1-11. Defendant has been incarcerated since May, 2008 and has never gone to trial. R.143-45. Defendant is being held on a \$1,000,000 bail. (Official Trial Court docket 5-19-08 entry.) Initially, defendant was represented by the LDA who later withdrew when defendant desired to hire David Drake, an attorney used in a prior case. R.35-36, 37,51-52. At the time defendant hired David Drake, he had sufficient funds to do so; however, after being incarcerated for at least a year (presently more than two years) and his wife being unemployed, he became indigent and unable to pay for any defense resources such as a private investigator, medical expert concerning the effects of the prescription medications he was taking at the time of the incident, and a ballistic expert, to demonstrate that because of the path of the bullets fired by defendant, he had no intention to kill any police officers since he was not aiming at them (even though the police shot more than 40 bullets through defendant's home, all the while

aiming at defendant who was shot twice, once through the shoulder and once through the right ear, that would have gone through his temple had he not fortuitously turned his head when the bullet struck him ). R.143-145, 219-243. Due to the absolutely necessity of obtaining the aforesaid defense resources, defendant, after becoming indigent, filed a Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witness (R.143-145) and a Supplement to Motion to Delcare Defendant Indigent and to Provide an Investigator and Expert Witness at State Expense (R.219-243).

After receiving an opposition memorandum from the state (actually Salt Lake County) (R.148-174), defendant filing his Supplement to the Indigent Motion (R.219-243), and Reply Memorandum from Salt Lake County (R.244-273), the Trial Court issued its Findings of Fact, Conclusions of Law, and Order Declaring Defendant Indigent and Denying Defense Resources for Defendant, and declaring Salt Lake County has no obligation to pay for any defense resources for defendant on August 21, 2009. R.280-283. Defendant then filed his Interlocutory Petition on or about September 10, 2009.

### **STATEMENT OF FACTS**

1. The information charged defendant (hereinafter "Jeffs") with four 1<sup>st</sup> degree felonies pursuant to § 76-5-202, Utah Code Ann., (identical except for the names of the various alleged victims): “Attempted Criminal Homicide, Aggravated Murder” and two 3<sup>rd</sup> degree felonies, a class A misdemeanor, and a class B misdemeanor. R.1-11.

2. Additionally, Jeffs was also charged with two 3<sup>rd</sup> degree felonies, a class A misdemeanor, and a class B misdemeanor. R.1-11

3. Initially, Jeffs was appointed the LDA. R.35-36. LDA withdrew when Jeffs obtained funds to hire Morrison & Morrison and David Drake who then entered appearances of counsel. R.37, 51-52, 281. At the time of Jeffs' initial appearance, David Drake was out of state and not available. Jeffs preferred to have Mr. Drake represent him rather than the LDA since Mr. Drake had previously twice represented Jeffs in the West Valley City Justice Court, which representation included a portion of the \$28,000 Jeffs stated was paid to Mr. Drake (R.281) (which also included \$10,000 paid to Grant W. P. Morrison).

4. Defendant has been incarcerated since May, 2008 with a \$1,000,000 bond. R.281,143 and Official Trial Court Docket, entry of May 19, 2008. Due to his incarceration, he has not been able to earn any income. Moreover, his wife has been unemployed since May, 2008, and, as of the date of this interlocutory appeal, has not obtained full time employment. Consequently, Jeffs is indigent and was declared so by Judge William W. Barrett, Third District Court Judge. R.281.

5. Currently, defendant's home is scheduled for a foreclosure proceeding on September 15, 2009. R.144.

6. In the findings of the trial court, Judge Barrett found that defendant initially had the funds to hire private counsel but has since become indigent due to his extended incarceration. R.280-283.

7. Based upon the opinion of defendant's counsel, it is necessary to hire an investigator to conduct interviews of the various police officers involved in order to avoid defendant's counsel from becoming witnesses and to perform other investigatory tasks

essential for his defense. R.143-145, 219-243.

8. Moreover, due to the paths of the bullets allegedly fired by defendant and the fact that Jeffs has been charged with intentionally attempting to kill various police officers, it is essential to the defense that a ballistic expert be retained in order to assist Jeffs with his defense, mainly to demonstrate that Jeffs was not shooting at any police officers. R.143-145, 219-243.

9. Defendant requested that medical experts be provided to testify regarding defendant's diminished capacity due to the side-effects of these prescription drugs, their interaction with each other, and the fact that Clonopin has a history of causing blackouts, suicide ideation, and other psychiatric problems. The prescription medications defendant was taking affected his capacity to understand what was occurring. It is essential for an expert to be provided in order to testify about defendant's diminished capacity, an expert to testify concerning the side-effects of the prescription drugs he was taking and the side-effects these drugs have with each other when taken together, and the effect such would have on the mental capacity of defendant. R.143-145, 219-243.

10. Medical experts are also essential for the defense concerning Jeffs' blood work on the night in question, after the shootings by the West Valley City Police, when flown by helicopter to the hospital, and how the results of his blood work would show his condition and whether such affected his condition. Moreover, such experts are needed to ascertain the blood levels of the involved police (to show, for one, whether they were on steroids), and how their blood levels affected their performance and perception. R.143-145, 219-243.

11. Defense counsel found a psychologist/medical expert who is not on the LDA list who has the expertise to address these diminished capacity issues of defendant. His name is Dr. Ron Houston, P.O. Box 148, Providence, UT 84332, 169 N. Spring Creek Parkway, Suite 235, Providence, UT 84332. However, as pointed out in defendant's motion, he lacks the funds for this defense resource. R.301-302.

### **SUMMARY OF ARGUMENT**

The Sixth Amendment to the United States Constitution requires that all indigent defendants be provided effective assistance of counsel. *See State v. Burns*, 2000 UT 56, 4 P.3d 795, ¶ 23. As a matter of equal protection, a state must "provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d. 400 (1971) and *Burns, supra*, at ¶ 23. The state's argument that in order to qualify for defense resources, defendant must be represented by the LDA and has no choice of counsel, clearly is in violation of the Equal Protection Clause of the U.S. Constitution, since those defendants represented by the LDA are treated differently than those who are pro se, represented *pro bono* by members of the Utah State Bar, or who retained private counsel and thereafter became indigent, as is the instant case. Jeffs is entitled to have counsel of his choice and should not be compelled to ditch his counsel of choice in order to qualify for defense resources under the Indigent Defense Act. *See U.S. v. Gonzalez-Lopez*, 548 U.S. 140, 126 S.Ct. 2557 (2006) and *Burns, supra*, at ¶ 32. As previously stated, this Court held in *Burns*, that the right to effective assistance of counsel includes the right to that assistance

of defense resources, such as experts and private investigators, which are used by defense counsel as necessary tools by which to construct a defense. The Utah Indigent Defense Act ("Act") codifies the Constitutional guarantee and provides a statutory scheme whereby counties can discharge their obligation to provide indigent defendants with legal counsel and defense resources, while having a measure of fiscal protection against the potential for unlimited liability when that right is asserted. Salt Lake County, in an attempt to conform to the Act, has entered into a contract with the Salt Lake Legal Defenders ("LDA"). However, contrary to the argument of Salt Lake County, its contract is insufficient to meet the requirements of the Act. The County also argues that receipt of such defense resources is conditioned upon the exclusive use of LDA attorneys. This argument is directly refuted by the text of the Act, is unsupported by the legislative history of the Act, and so ignores the holding and rationale of *State v. Burns* that would serve to deprive, rather protect indigent defendants' rights to Due Process and Equal Protection and the effective assistance of counsel by unreasonably constricting the resources provided, depriving such defendants the right to the counsel of their choice, causing a chilling effect on *pro se* representation, and severely limiting and/or impeding alternative representation by *pro bono* private counsel.

## **ARGUMENT**

### **I. AS AN INDIGENT, WHETHER JEFFS HAS A RIGHT TO KEEP THE COUNSEL OF HIS CHOICE AND ENTITLEMENT TO DEFENSE RESOURCES UNDER THE ACT WITHOUT HAVING TO GIVE UP THE PRIVATE ATTORNEY HE RETAINED AND ACCEPT LDA COUNSEL**

The Sixth Amendment to the United States Constitution requires that all indigent



defendants be provided effective assistance of counsel. *See State v. Burns*, 2000 UT 56, 4 P.3d 795, ¶ 23. As a matter of equal protection, a state must "provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 30 L.Ed.2d. 400 (1971) and *Burns, supra*, at ¶ 23.

It is clear that defendant would have the defense resources (expert witnesses and a private investigator) he requested available to him at state expense if he were represented by the LDA since he was found to be indigent. Since defendant is now indigent and continues to retain his private counsel, he is now being treated disparately. He is also being forced to make an election to continue to be represented by the private counsel of his choosing or fire that private counsel and have the LDA represent him. Part and parcel of defendant's 6<sup>th</sup> amendment right is the right to choice of counsel. *See U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006), 126 S.Ct. 2557 ["In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'"] "The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee."] The U.S. Supreme Court then stated:

Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice — which is the right to a particular lawyer regardless of comparative effectiveness — with the right to effective counsel — which

imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

*Id.* at 148.

The trial court was of the opinion that in light of recent amendments to the Indigent Defense Act (“Act”), *State v. Burns*, 2000 UT 56, 4 P.3d 795, was no longer controlling and the State did not have to provide any defense resources to Jeffs since he is being represented by private counsel. In light of the recent case of *State v. Barber*, 2009 UT App 91, filed April 9, 2009, it appears the Trial Court has erred. Apparently, *State v. Barber* reaffirmed the Utah Supreme Court holding in *State v. Burns*. The defendant in *Barber* hired private counsel but was unable to hire Dr. Rothfeder as an expert witness, which private counsel admitted that “an expert would have been 'very' helpful in preparing the defense but that one was not hired because Barber lacked sufficient funds to pay an expert's fees”.

Regarding the decision in *Burns*, the *Barber* Court stated:

Rule 15 of the Utah Rules of Criminal Procedure provides that '[u]pon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, **the witness fee shall be paid as if he were called on behalf of the prosecution.**' Utah R. Crim. P. 15(a). Furthermore, **Utah law guarantees indigent defendants "public assistance for expert witnesses" irrespective of whether they are represented by the LDA or private counsel.** See *State v. Burns*, 2000 UT 56, ¶¶ 31-32, 4 P.3d 795 ('There is no indication in [rule 15] that a defendant must be represented by [the] LDA to qualify for this assistance.'). [Emphasis added.]

*Id.* at ¶ 21.

It is clear from *Barber* that 1) *Burns* remains good law; and 2) Utah laws guarantees indigent defendants public assistance for expert witnesses irrespective of whether they are

represented by the LDA or private counsel; consequently, defendant is entitled to the have the county pay for this defense resource. (*Barber* also noted that an element of the Sixth Amendment right to counsel is the right of a defendant who does not require appointed counsel to choose who will represent him. *Id.* at ¶ 41.)

In accord, *State v. Schoonmaker*, 143 N.M. 373, 176 P.3d 1105 (2008) [“We note that most states that have interpreted their indigent defense statutes in similar cases have held that indigent defendants are not required to be represented by the public defender in order to receive state funding for ancillary services that comprise ‘the basic tools of an adequate defense.’ (Citing *Burns* with approval.)]; and *State v. Carreno*, 144 P.3d 1152, 1157-59, 2006 UT 59 [The Utah Supreme Court noted state law “requires that a local government ‘provide [an indigent defendant with] the investigatory resources necessary for a complete defense.’” Utah Code Ann. §77-32-301(3) (2003).

[R]egardless of the cost, if the resources are necessary for a complete defense, the court must approve them. Extending this reasoning to the Act, it would be inappropriate to set an absolute cap of reimbursable expenses for investigative purposes. Rather, a defendant should always have the opportunity to request approval for additional expenditures, and the court must approve such requests to the extent necessary for a complete defense.”

*Id.* at 1157.]

In accord, *United States v. Collins*, 920 F.2d 619, 625 (10<sup>th</sup> Cir.1990) [“Attorneys are not fungible; often, the most important decision a defendant make in shaping his defense is his selection of an attorney”], *superseded by statute on other grounds as recognized by Lewis v. Commissioner of Internal Revenue*, 523 F.3d 1272 (10<sup>th</sup> Cir.2008).

This Sixth Amendment Right to Counsel of Choice (somewhat more circumscribed than those of a defendant who can pay or persuade an attorney to assist him) also includes a separate and co-equal right to be provided with the resources necessary to prepare and present a complete and effective defense. *See Ake v. Oklahoma*, 470 U.S. 68, 76-77, 105 S.Ct. 1087 (1985). To assume otherwise would not only deny Jeffs his rights of Due Process, but his rights of Equal Protection.

**A. Whether The Denial Of These Defense Resources To Jeff Who Is Indigent And Not Represented By The LDA Is A Denial Of His Rights Of Due Process And Equal Protection**

This issue was presented to the trial court in defendant's Motion to Declare Defendant Indigent and to Provide An Investigator and Expert Witness [sic] at State Expense; defendant's Correction of Prosecutor's Statement Concerning Whether State v. Burns Is Still Good Law; defendant's Supplement to Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witnesses at State Expense; and defendant's Reply to State's Response Re Indigency; all contained in the *Addenda*.

The consequence of the Trial Court's and Salt Lake County's interpretation of the Act, those indigent defendants represented by the LDA are treated differently from those indigent defendant represented by private counsel. Since defendant has fundamental rights guaranteed by state and federal constitutions where his liberty is at stake, the Act, if the Trial Court's and Salt Lake County's interpretations are correct, is unconstitutional. If the Trial Court's and Salt Lake County's interpretations are not correct, then their application of the Act is unconstitutional. However, both the Trial Court and Salt Lake County ignored the

legislative history of the Act, including its purpose, and imposed requirements in the Act that are no there. *See* argument below.

*Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087 (1985), alludes to this denial of equal protection: "This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that ***justice cannot be equal*** where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." [Emphasis added.] (However, see fn 13 expressly not applying equal protection to the issues in that case.)

In *Britt v. North Carolina*, 404 U.S. 226, 227, 92 S.Ct. 431, 433, 30 L.Ed.2d 400 (1971), the United States Supreme Court made it clear that "state[s] must, ***as a matter of equal protection***, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners. It is equally evident that if a defendant is denied access to the basic tools of an adequate defense, then he has also been denied his due process right of a fair trial." [Emphasis added.] *See Griffin v. Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956).

According to the United States Supreme Court, equal protection "does not require absolute equality or precisely equal advantages." (*Ross v. Moffitt* 417 U.S. 600, 612 (1974) [94 S.Ct. 2437, 41 L.Ed.2d 341].) "The duty of the State . . . is not to duplicate the legal arsenal that may be privately retained by a criminal defendant." However, the equal protection argument made here is comparing indigent defendants represented by the LDA who have a large exclusive legal arsenal available to them by virtue of LDA representation with indigent defendants who have retained private counsel and have little or no legal arsenal available to them. Such inequality should be

rectified by treating all indigent defendants the same, providing defense resources to all indigent defendants regardless of legal representation. Accord, *State v. Burns*, *supra*, ¶ 31.

It should be noted that the facts here are almost identical to the facts in *Burns* – either Jeffs "(1) keep [his] attorney, retained by [him], and forgo access to state-funded expert assistance; or (2) give up the attorney [he] had retained and accept LDA counsel who would then provide [him] with access to such assistance." *Id.* at ¶ 21.

In order to comply with its constitutional duties, the State of Utah implemented the Act, § 77-32-101 *et seq.* At the time Jeffs filed his motions to obtain expert witnesses and a private investigator (defense resources) at county expense, the Act provided the following minimum standards for defense of an indigent:

Each county, city, and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:

- (1) provide counsel for each indigent who faces the substantial probability of . . . the deprivation of the indigent's liberty;
- (2) afford timely representation by competent legal counsel;
- (3) provide the investigatory resources necessary for a complete defense;
- (4) assure undivided loyalty of defense counsel to the client;
- (5) proceed with a first appeal of right; and
- (6) prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

*Id.* at § 77-32-301.

Conspicuously absent from the requirement to provide an adequate defense is any sort of limitation or restraint upon the general duty imposed upon the state by this statute. In § 302(1) of the Act, the legislature elucidates clearly the state's burden to provide both legal

counsel and/or "defense resources necessary for an effective defense." Subsection 302(1)(a) clearly states the separate duties of providing counsel and resources; and, states with equal clarity, that an indigent may request "counsel *or* defense resources *or* both". [Emphasis added.] Thus, legal assistance and defense resources are two separate but inherent elements of a state's constitutional obligation to provide counsel for the indigent criminal defendant.

In this case, the Findings of Fact, Conclusions of Law, and Order clearly declare and find Jeffs indigent. Since he has been charged with four 1<sup>st</sup> degree felonies, in addition to other felonies and misdemeanor(s), which could result in "a substantial probability that the penalty to be imposed is confinement in either jail or prison" (§ 77-32-302(1)), he is statutorily entitled to legal counsel, defense resources, *or both* upon his request. See Utah Code Ann., § 77-32-302(1)(a). Under the plain language of the statute, Jeffs is under no obligation to request any of these services, nor is he required to request representation by the LDA if he requests only defense resources.

In fact, § 77-32-302(1)(b) mandates that once a defendant has been found to be indigent and therefor eligible for assistance, the only way the state can be relieved of its burden is for a defendant to "affirmatively waive or reject on the record the opportunity to be represented and provided defense resources [NOTE: disjunctive]." Waiving only one of these prongs cannot relieve the state of its duty to provide the other. Because Jeffs has not "affirmatively" and "on the record" waived his right to "be represented and provided defense resources", the state has not been relieved of its duty to provide them.

## **II. WHETHER THE UTAH LEGISLATURE NEITHER ATTEMPTED NOR ACHIEVED OVERTURNING THIS COURT'S RULING IN STATE V. BURNS<sup>1</sup>**

The issue of whether a defendant must forgo his counsel of choice in order to obtain expert and private investigator assistance (defense resources) was succinctly and authoritatively decided by this Court in *State v. Burns*, 2000 UT 56. In *Burns*, defendant's father provided private counsel on behalf of his daughter and the State sought to prevent her access to state-funded expert assistance, the same as in this case. The *Burns* Court held that where indigence and necessity are both shown, a defendant is entitled to expert witness funding. *Id.* at ¶ 28. *Burns* also cited Rule 15, U.R.Crim.P., as further support for its holding: "Furthermore, rule 15 of the Utah Rules of Criminal Procedure provides that "[u]pon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution." Utah R.Crim. P. 15(a). (Footnotes omitted.) There is no indication in this rule that a defendant must be represented by LDA to qualify for this assistance. Instead, the only prerequisites for eligibility are financial inability to pay and necessity for an adequate defense." *Burns*, at ¶ 31.

In its opposing memorandum to Jeff's motion for defense resources and determination of him being indigent, Salt Lake County argued that the Utah Legislature overturned *Burns*

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<sup>1</sup> To give credit where credit is due, this portion of the Brief is almost verbatim what was stated in the *State v. Parduhn* Brief. Consequently, Jeffs is using Parduhn's well thought out and articulated argument since it is equally applicable to him.



with its post-*Burns* amendment and denied the applicability of *State v. Barber, supra*. The county's position overstates and misstates the effect of the post-*Burns* amendment to the Act.

The changes made by the 2001 Legislature essentially add the phrase, "defense resources" to the clauses contained in §§ 77-32-302(1), (2)(a), and (2)(b). Looking at the plain language of the statute, this change was little more than a clarification that the counties has a duty to provide defense counsel and defense resources; and, a county can satisfy its duty to provide defense resources through contracting with defense experts directly or by allowing a legal aid association to sub-contract for defense experts and like resources. The additional language in § 77-32-302(1)(a) was written in the disjunctive. An indigent may request "counsel **OR** defense resources **OR** both". [Emphasis added.]

The apparent concern of the legislature was that, post-*Burns*, the State would have to pay exorbitant costs to fly in internationally-renowned experts from the four corners of the globe to testify on behalf of an indigent defendant when competent local authorities were available to satisfy the legal need. In an effort prevent this, but while recognizing the indigent defendant's right to have defense resources provided, the legislature attempted to implement a scheme to control these costs. Senator Hillyard, introducing the bill on behalf of bill-sponsor Senator Gladwell, elucidated this intent, as follows:

The problem get to be, a person may have some money so he can hire an attorney but doesn't have the money to buy the experts he needs for trial and that's been the kind of problem the courts have dealt with. A recent Utah Supreme Court case came back and said if his money is all gone spending for the lawyer, then he is appointed the experts that he needs for his case and so these bills have been coming in and really hampering the counties. What this bill basically says is we acknowledge that right, but to use an expert you will

have to take it off the panel that the court-appointed attorney uses all the time. They have a contract with the county, you then have these experts that they could use. They are good qualified experts, but here is a contract limiting what they can charge on fees and what the county has to pay and think it makes sense to give the defendant the rights he needs but still have some protection for the county so they don't go out and hire some expert from New York and bring them [sic] in and pay him whatever charges he may have.

*See* Senate Floor Debate Audio Recording for Senate Bill 154 on February 12, 2001.<sup>2</sup>

Far from attempting to overturn *Burns*, this Bill explicitly acknowledges *Burns*, not by name but by reference, and provides a means whereby if the counties and cities comply with the plain language of the statute, they would have some measure of fiscal protection from the seemingly unlimited obligation imposed on them by Due Process, Equal Protection, and §§ 77-32-301 and 302(1).

**A. Because Salt Lake County's Contract With LDA Has No Provision for Defense Resources, the Protections Included in the Act do not Apply**

Salt Lake County's claim that Jeffs must be represented by LDA in order to receive defense resources and/or that Jeffs must use a defense resources contracted for by the Salt Lake County LDA is precluded by the fact that LDA has no such contract for expert assistance. Section 77-32-302(2)(b) provides that a county or municipality may contract with a legal aid association to provide for both legal defense resources and/or counsel. Section 77-32-302(c) also provides that the county can directly contract with defense resources and provide notice of such contract to a court. If the county does either of these two things, then the Act requires that an indigent defendant seeking appointment, first attempt to draw from

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<sup>2</sup> Available at <http://www.le.state.ut.us/asp/audio/index.asp?Sess=2001GS&BILL=SB0154&Day=0&House=S>

this pool of contracting or sub-contracting resources, if they are available, while preparing his defense. It is only in this circumstance that the provisions of § 77-32-303 of the Act come into play. Section 303 of the Act provides:

If a county or municipality has contracted for, or otherwise made arrangements for, the legal defense of indigents, including a competent attorney and defense resources, the court may not appoint a noncontracting attorney or resource either under this part, section 78B-1-151, or Rule 15, Utah Rules of Criminal Procedure, unless the court:

(1) conducts a hearing with proper notice to the responsible entity to consider the authorization or designation of a noncontracting attorney or resource; and

(2) makes a finding that there is a compelling reason to authorize or designate a noncontracting attorney or resources for the indigent defendant.

*Id.* at § 77-32-303, U.C.A.

Again, the plain language of the statute indicates that *if* the county has contracted specifically for defense resources and/or competent attorneys, only then must a defendant show a compelling reason to have the county pay for an expert or lawyer that is not already otherwise available as part of the county contract. In this case, § 303's requirement of showing a compelling reason does not come into play for several reasons: 1) Jeffs does not wish to have the court appoint, nor the county pay for, a lawyer; 2) He would happily utilize a private investigator, a ballistics expert, a medical expert concerning his blood samples and the blood samples of the West Valley City police who gave such, and a medical expert who would be able to testify concerning the interaction between the prescription drugs Jeffs was taking and how these drugs could affect his conscious decisions, memory, and suicide ideation; however, 3) The county has no contract with such an expert, LDA has no such

contract, nor does Salt Lake County have a contract with LDA to provide such. As part of its memorandum opposing Jeffs' request for these defense resources, Salt Lake County provided a copy of its contract with the Salt Lake Legal Defenders Association (R. 157-174). This contract makes absolutely no provision for "defense resources". As a consequence, the County is without the protections offered in § 302 or § 303 and is therefor subject to the full burden imposed by Due Process and § 301 of the Act.

**B. The Existence of a Contract for Defense Resources Cannot Be Used to Deprive Indigent Defendants of Access to Counsel of Their Choice Or Defense Resources**

Assuming, *arguendo*, that the necessary provisions were included in the contract, the State would still be prevented by the plain language of the statute from asserting that the right to government funded defense resources was conditioned upon acceptance of LDA counsel. (This argument also runs afoul of the constitutional dictates of the United States Supreme Court cases cited above concerning an indigent's right to counsel of his choosing and to defense resources.) The state argues that the intent of the 2001 legislative changes to the statute was to force an indigent defendant to accept LDA as his legal counsel, and use LDA's sub-contracted board of experts for his defense resources. Yet, the State failed to cite to any provision in the statute or otherwise for its argument.

Moreover, if a defendant had the temerity to relieve the County of part of its burden by obtaining counsel or expert advice on his own, the County's position would be that he may not do that, lest he forgo all other assistance necessary for his defense. Even if this strained reading of the statute were accurate, the fact that there is no indication, through contract or

otherwise, that a sub-contracted board of experts even exists prohibits the State (County) from denying any indigent defendant his constitutionally-guaranteed defense resources. Additionally, such a position would be inconsistent with the position taken by the State in other cases where it has taken the position that "an indigent defendant proceeding *pro se* who has declined standby counsel from the LDA would be able to acquire funding for expert assistance." *State v. Burns*, *supra*, citing *State v. Bakalov*, 1999 UT 45, ¶¶ 9, 35, 979 P.2d 799.

In reality, there is no conflict between *Burns* and the Act. *State v. Burns* merely articulated the two duties inherent to the right of Due Process (and Equal Protection) that were endorsed and codified by the legislature, which also provided a simple-to-comply-with scheme permitting the counties to exert some degree of reasonable control over the otherwise limitless potential costs of fulfilling their duties.

While Jeffs concedes that it is reasonable for the County, through the Act, to prevent an indigent defendant from abusing the resources of the county by asserting exorbitant demands for superstar lawyers and globetrotting experts on the county's dime, it is not reasonable for a county to attempt to use the Act to prevent an indigent defendant from obtaining whatever expert or lawyer he is able to obtain through his own endeavors. The County's attempt to use the Act as a sword to deprive an indigent defendant of his constitutional rights protected by the Act, flies directly in the face of the obvious purpose of the Act to be a shield for those who do not have the means to otherwise prevent the juggernaut of the State from crushing them without pause, or care.

### III. WHETHER DENYING INDIGENT DEFENDANTS DEFENSE RESOURCES WOULD CATASTROPHICALLY UNDERMINE PRO BONO REPRESENTATION BY PRIVATE ATTORNEYS IN UTAH

Finally, should the county's position be adopted, the private defense bar would face a profound, if not fatal, disincentive from providing *pro bono* or reduced fee legal services in Utah communities. Accepting a case without being able access the Constitutionally mandated defense resources to defend an indigent client would necessarily catch *pro bono* defense counsel between the Scylla and Charybdis of taking upon themselves the unlimited obligation discussed, *supra*, to fund such resources, or running afoul of, *inter alia*, the following canons of professional responsibility:

- ◆ The requirement of reasonable thoroughness and preparation. (URPC 1.1)
- ◆ The mandated diligence and promptness in the face of the personal burden on *pro bono* counsel in representing a client. (URPC 1.3, *See* comment 1.)
- ◆ The heightened impetus to withdraw because of unreasonable financial burden, having a remarkable chilling effect on *pro bono* criminal defense representation. (URPC 1.16(bX6).)
- ◆ The implicit incentive to delay litigation in order to amortize *pro bono* counsel's financial loss by delaying the case. (URPC 3.2, *see* comment 1.)
- ◆ Such a scheme would provide a blanket justification for all but the richest attorneys to avoid appointments by the court due to the likelihood of an unreasonable financial burden (URPC 6.2(b)). It would also almost entirely defeat the aspirational goal of provision of *pro bono* services in Rule 6.1 by any means other than the \$10 per hour

donation. (URPC 6.1(c)).

Moreover, such lack of availability of defense resources would produce a hotbed of bar complaints and claims of ineffective assistance of counsel, which any reasonable attorney would seek to avoid.

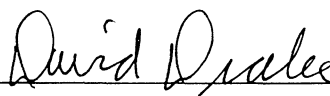
Furthermore, if there were an exception made to *pro bono* representation, such would constitute a denial of equal protection thereby creating another constitutional morass for the courts and legislature.

### **CONCLUSION**

Jeffs seeks a ruling reaffirming this Court's holding in *Burns*, that the right to legal counsel and the right to defense resources are two distinct, constitutionally mandated rights of indigent defendants. Further, this Court should order that unless a defendant waives his right to both counsel and defense resources affirmatively and on the record, his waiver of one of these rights can not be construed as a waiver of the other. Finally, Jeffs respectfully requests that this Court hold that the Trial Court's denial of his motion for defense resources was erroneous and should be reversed, with a remand to the District Court with instructions to order Salt Lake County to provide Jeffs with the defense resources necessary to prepare his defense, as requested by him in his motions.

RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of August, 2010.

DAVID DRAKE, P.C.  
Attorney for Appellant, Randy Fetch Jeffs

  
David Drake


### CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on August 16, 2010 a true and correct two copies of the foregoing Initial Brief of Appellant was mailed, first class postage prepaid, to the following counsel of record:

Donald H. Hansen, Esq.  
Deputy Salt Lake County District Attorney  
2001 South State Street, Suite S3600  
Salt Lake City, UT 84190-1200

And 9 copies and one original hand-delivered to the

Utah Supreme Court  
Matheson Courthouse  
450 South State Street, 5<sup>th</sup> Floor  
Salt Lake City, UT 84111

By: 



# ADDENDA

## **ADDENDA TABLE OF CONTENTS**

- ADDENDUM 1: Copies of U.S. Constitution, Sixth Amendment
- ADDENDUM 2: Copies of Excerpts from Utah Indigent Defense Act
- ADDENDUM 3: Copies of Excerpts from Utah Rules of Professional Conduct and Rule 15, U.R.Crim.P.
- ADDENDUM 4: Copy of Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witness [sic] at State Expense; Supplement to Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witnesses at State Expense
- ADDENDUM 5: Copy of State's Memorandum in Opposition to Defendant's Motion To Provide an Investigator and Expert Witnesses at State Expense
- ADDENDUM 6: Findings of Fact, Conclusions of Law, and Order Regarding Defendant's Indigent Defense Expenses

# **ADDENDUM 1**

**Amendment 6 - Right to Speedy Trial, Confrontation of Witnesses.  
Ratified 12/15/1791.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an **impartial** jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his **defence**.

# **ADDENDUM 2**

Search

Title Chapter Section

Go To

Utah CodeTitle 77 Utah Code of Criminal ProcedureChapter 32 Indigent Defense Act**Section 101** Indigent Defense Act**77-32-101. Indigent Defense Act.**

This chapter is known as the "Indigent Defense Act "

Enacted by Chapter 354, 1997 General Session

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Utah Code

Title 77 Utah Code of Criminal Procedure

Chapter 32 Indigent Defense Act

**Section 301** Minimum standards for defense of an indigent.

**77-32-301. Minimum standards for defense of an indigent.**

Each county, city, and town shall provide for the defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with the following minimum standards:

- (1) provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent's liberty;
- (2) afford timely representation by competent legal counsel;
- (3) provide the investigatory resources necessary for a complete defense;
- (4) assure undivided loyalty of defense counsel to the client;
- (5) proceed with a first appeal of right; and
- (6) prosecute other remedies before or after a conviction, considered by defense counsel to be in the best interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

Numbered and Amended by Chapter 354, 1997 General Session

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Utah CodeTitle 77 Utah Code of Criminal ProcedureChapter 32 Indigent Defense Act**Section 302** Assignment of counsel on request of indigent or order of court.**77-32-302. Assignment of counsel on request of indigent or order of court.**

(1) Legal counsel shall be assigned to represent each indigent and the indigent shall also be provided access to defense resources necessary for an effective defense, if the indigent is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

(a) the indigent requests counsel or defense resources, or both; or

(b) the court on its own motion or otherwise orders counsel, defense resources, or both and the defendant does not affirmatively waive or reject on the record the opportunity to be represented and provided defense resources.

(2) (a) If a county responsible for providing indigent legal defense, including counsel and defense resources, has established a county legal defender's office and the court has received notice of the establishment of the office, the court shall assign to the county legal defender's office the responsibility to defend indigent defendants within the county and provide defense resources.

(b) If the county or municipality responsible to provide for the legal defense of an indigent, including defense resources and counsel, has arranged by contract to provide those services through a legal aid association, and the court has received notice or a copy of the contract, the court shall assign the legal aid association named in the contract to defend the indigent and provide defense resources.

(c) If the county or municipality responsible for providing indigent legal defense, including counsel and defense resources, has contracted to provide those services through individual attorneys, individual defense resources, or associations providing defense resources, and the court has received notice or a copy of the contracts, the court shall assign a contracting attorney as the legal counsel to represent an indigent and a contracted defense resource to provide defense-related services.

(d) If no county legal defender's office exists, the court shall select and assign an attorney or defense resource if:

(i) the contract for indigent legal services is with multiple attorneys or resources; or

(ii) the contract is with another attorney in the event of a conflict of interest.

(e) If the court considers the assignment of a noncontracting attorney or defense resource to provide legal services to an indigent defendant despite the existence of an indigent legal services contract and the court has a copy or notice of the contract, before the court may make the assignment, it shall:

(i) set the matter for a hearing;

(ii) give proper notice of the hearing to the attorney of the responsible county or municipality; and

(iii) make findings that there is a compelling reason to appoint a noncontracting attorney or defense resource.

(f) The indigent's preference for other counsel or defense resources may not be considered a compelling reason justifying the appointment of a noncontracting attorney or defense resource.

(3) The court may make a determination of indigency at any time.



nended by Chapter 49, 2006 General Session

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Utah Code

Title 77 Utah Code of Criminal Procedure

Chapter 32 Indigent Defense Act

**Section 303** Standard for court to appoint noncontracting attorney or defense resource -- Hearing.

**77-32-303. Standard for court to appoint noncontracting attorney or defense resource -- Hearing.**

If a county or municipality has contracted for, or otherwise made arrangements for, the legal defense of indigents, including a competent attorney and defense resources, the court may not appoint a noncontracting attorney or resource either under this part, Section **78B-1-151**, or Rule 15, Utah Rules of Criminal Procedure, unless the court:

- (1) conducts a hearing with proper notice to the responsible entity to consider the authorization or designation of a noncontract attorney or resource; and
- (2) makes a finding that there is a compelling reason to authorize or designate a noncontracting attorney or resources for the indigent defendant.

Amended by Chapter 3, 2008 General Session

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# **ADDENDUM 3**

**Rule 1.1. Competence.**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

**Comment****Legal Knowledge and Skill**

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems. Perhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve, a skill that necessarily transcends any particular specialized knowledge. A lawyer can provide adequate representation in a wholly novel field through necessary study. Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical. Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

[4] A lawyer may accept representation where the requisite level of competence can be achieved by reasonable preparation. This applies as well to a lawyer who is appointed as counsel for an unrepresented person. See also Rule 6.2.

**Thoroughness and Preparation**

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

**Maintaining Competence**

[6] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

**Rule 1.16. Declining or terminating representation.**

a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

- a)(1) the representation will result in violation of the rules of professional conduct or other law;
- a)(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or
- a)(3) the lawyer is discharged.

b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

- b)(1) withdrawal can be accomplished without material adverse effect on the interests of the client ;
- b)(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
- b)(3) the client has used the lawyer's services to perpetrate a crime or fraud;
- b)(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;
- b)(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- b)(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- b)(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer must provide, upon request, the client's file to the client. The lawyer may reproduce and retain copies of the client file at the lawyer's expense.

**Comment**

1. A lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion. Ordinarily, a representation in a matter is completed when the agreed upon assistance has been concluded. See Rules 1.2(c) and 6.5. See also Rule 1.3, Comment 4.

**Mandatory Withdrawal**

2. A lawyer ordinarily must decline or withdraw from representation if the client demands that the lawyer engage in conduct that is illegal or violates the rules of professional conduct or other law. The lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may make such a suggestion in the hope that a lawyer will not be constrained by a professional obligation.

3. When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. See also Rule 6.2. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

**Discharge**

4. A client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services. Where future dispute about the withdrawal may be anticipated, it may be advisable to prepare a written statement reciting the circumstances.

5. Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self representation by the client.

6. If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event

the discharge may be seriously adverse to the client's interests. The lawyer should make special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.

#### Optional Withdrawal

7. A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

8. A lawyer may withdraw if the client refuses to abide by the terms of an agreement relating to the representation, such as an agreement concerning fees or court costs or an agreement limiting the objectives of the representation.

#### Assisting the Client upon Withdrawal

9. Even if the lawyer has been unfairly discharged by the client, a lawyer must take all reasonable steps to mitigate the consequences to the client. See Rule 1.15. Upon termination of representation, a lawyer shall provide, upon request, the client's file to the client notwithstanding any other law, including attorney lien laws. It is impossible to set forth one all encompassing definition of what constitutes the client file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation materials such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings. The Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.

**Rule 1.3. Diligence.**

A lawyer shall act with reasonable diligence and promptness in representing a client.

Comment

1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

2] A lawyer's work load must be controlled so that each matter can be handled competently.

3] Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter. See Rule 1.4(a)(2). Whether the lawyer is obligated to prosecute the appeal for the client depends on the scope of the representation the lawyer has agreed to provide to the client. See Rule 1.2.

5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action. Cf. Rule 27 of the Utah Rules for Lawyer Discipline and Disability (providing for court appointment of a lawyer to inventory files and take other protective action in absence of a plan providing for another lawyer to protect the interests of the clients of a deceased or disabled lawyer).

**Rule 3.2. Expediting Litigation.**

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

**Comment**

[1] Dilatory practices bring the administration of justice into disrepute. Although there will be occasions when a lawyer may properly seek a postponement for personal reasons, it is not proper for a lawyer to routinely fail to expedite litigation solely for the convenience of the advocates. Nor will a failure to expedite be reasonable if done for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. The standard is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.



### **Rule 6.1. Voluntary Pro Bono Legal Service.**

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least 50 hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

a) provide a substantial majority of the 50 hours of legal services without fee or expectation of fee to:

a)(1) persons of limited means or

a)(2) charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

b) provide any additional services through:

(b)(1) delivery of legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations in matters in furtherance of their organizational purposes, where the payment of standard legal fees would significantly deplete the organization's economic resources or would be otherwise inappropriate;

(b)(2) delivery of legal services at a substantially reduced fee to persons of limited means; or

(b)(3) participation in activities for improving the law, the legal system or the legal profession.

(c) A lawyer may also discharge the responsibility to provide pro bono publico legal services by making an annual contribution of at least \$10 per hour for each hour not provided under paragraph (a) or (b) above to an agency that provides direct services as defined in paragraph (a) above.

(d) Each lawyer is urged to report annually to the Utah State Bar whether the lawyer has satisfied the lawyer's professional responsibility to provide pro bono legal services. Each lawyer may report this information through a simplified reporting form that is made a part of the Bar's annual dues statement.

(e) In addition to providing pro bono legal services, a lawyer should voluntarily contribute financial support to organizations that provide legal services to persons of limited means.

#### **Comment**

[1] Every lawyer, regardless of professional prominence or professional work load, has a responsibility to provide legal services to those unable to pay. Personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. All lawyers are urged to provide a minimum of 50 hours of pro bono services annually. It is recognized that in some years a lawyer may render greater or fewer hours than the annual standard specified, but during the course of the lawyer's legal career, each lawyer should render on average per year, the number of hours set forth in this Rule. Services can be performed in civil, criminal or quasi-criminal matters for which there is no government obligation to provide funds for legal representation, such as post-conviction death penalty appeal cases.

[2] Paragraphs (a)(1) and (a)(2) recognize the critical need for legal services that exists among persons of limited means by providing that a substantial majority of the legal services rendered annually to the disadvantaged be furnished without fee or expectation of fee. Legal services under these paragraphs consist of a full range of activities, including individual and class representation, the provision of legal advice, legislative lobbying, administrative rule making and the provision of free training or mentoring to those who represent persons of limited means. The variety of these activities should facilitate participation by government lawyers, corporate counsel and others, even when restrictions exist on their engaging in the outside practice of law.

[3] Persons eligible for legal services under paragraphs (a)(1) and (a)(2) are those who qualify for participation in programs funded by the Legal Services Corporation and those whose incomes and financial resources are slightly above the guidelines utilized by such programs but nevertheless cannot afford counsel. Legal services can be rendered to individuals or to organizations such as homeless shelters, battered women's centers and food pantries that serve those of limited means. The term "governmental organizations" includes, but is not limited to, public protection programs and sections of governmental or public sector agencies.

[4] Because service must be provided without fee or expectation of fee, the intent of the lawyer to render free legal services is essential for the work performed to fall within the meaning of paragraphs (a)(1) and (a)(2). Accordingly, services rendered cannot be considered pro bono if an anticipated fee is uncollected, but the award of statutory attorneys' fees in a case originally accepted as pro bono would not disqualify such services from inclusion under this section. Lawyers who do receive fees in such cases are encouraged to contribute an appropriate portion of such fees to organizations or projects that benefit persons of limited means.

[5] While it is possible for a lawyer to fulfill the annual responsibility to perform pro bono services exclusively through activities described in paragraphs (a)(1) and (a)(2), to the extent that any hours of service remain unfulfilled, the remaining commitment can be met in a variety of ways as set forth in paragraph (b). Constitutional, statutory or regulatory restrictions may prohibit or impede government and public sector lawyers and judges from performing the pro bono services outlined in paragraphs (a)(1) and (a)(2). Accordingly, where those restrictions apply, government and public sector lawyers and judges may fulfill their pro bono responsibility by performing services outlined in paragraph (b).

[6] Paragraph (b)(1) includes the provision of certain types of legal services to those whose incomes and financial resources place

them above limited means. It also permits the pro bono lawyer to accept a substantially reduced fee for services. Examples of the types of issues that may be addressed under this paragraph include First Amendment claims, Title VII claims and environmental protection claims. Additionally, a wide range of organizations may be represented, including social service, medical research, cultural and religious groups.

[7] Paragraph (b)(2) covers instances in which lawyers agree to and receive a modest fee for furnishing pro bono legal services to persons of limited means. Participation in judicare programs and acceptance of court appointments in which the fee is substantially below a lawyer's usual rate are encouraged under this section.

[8] Paragraph (b)(3) recognizes the value of lawyers engaging in activities that improve the law, the legal system or the legal profession. Serving on bar association committees, serving on boards of pro bono or legal services programs, taking part in Law Day and other law related education activities, acting as a continuing legal education instructor, a mediator or an arbitrator and engaging in legislative lobbying to improve the law, the legal system or the profession are a few examples of the many activities that fall within this paragraph.

[9] Because the provision of pro bono services is a professional responsibility, it is the individual ethical commitment of each lawyer. Nevertheless, there may be times when it is not feasible for a lawyer to engage in pro bono services. At such times a lawyer may discharge the pro bono responsibility by providing financial support to organizations providing free legal services to persons of limited means. In addition, at times it may be more feasible to satisfy the pro bono responsibility collectively, as by a firm's aggregate pro bono activities.

[9a] The Utah Rule, unlike the Model ABA Rule, contains paragraph (c), which explicitly allows lawyers to discharge their pro bono services responsibility by annually contributing at least \$10 per hour for each hour not provided under paragraphs (a) and (b). While the personal involvement of each lawyer in the provision of pro bono legal services is generally preferable, such personal involvement may not always be possible. The annual contribution alternative allows a lawyer to provide financial assistance to increase and improve the delivery of pro bono legal services when a lawyer cannot or decides not to provide pro bono legal services through the contribution of time. Also, there is no prohibition against a lawyer's contributing a combination of hours and financial support.

[10] Because the efforts of individual lawyers are not enough to meet the need for free legal services that exists among persons of limited means, the government and the profession have instituted additional programs to provide those services. Every lawyer should financially support such programs, in addition to either providing direct pro bono services or making financial contributions when pro bono service is not feasible.

[11] Law firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for in this Rule.

[11a] The Utah Rule, unlike the Model ABA Rule, contains paragraph (d) concerning voluntary reporting to the Utah State Bar. Voluntary reporting is designed to provide a basis for reminding lawyers of their professional responsibility under this Rule and to provide useful statistical information. The intent of this Rule is to direct resources towards providing representation for persons of limited means. Therefore, only contributions made to organizations described in subsection (a) should be reported. Reporting records for individual attorneys will not be kept or released by the Utah State Bar. The Utah State Bar will gather useful statistical information at the close of each reporting cycle and then purge individual reporting statistics from its database. The general statistical information will be maintained by the Bar for year-to-year comparisons and may be released, at the Bar's discretion, to appropriate organizations and individuals for furthering access to justice in Utah.

[12] The responsibility set forth in this Rule is not intended to be enforced through disciplinary process.

## **Rule 6.2. Accepting Appointments.**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

- a) Representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
- b) Representing the client is likely to result in an unreasonable financial burden on the lawyer; or
- c) The client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

### **Comment**

[1] A lawyer ordinarily is not obliged to accept a client whose character or cause the lawyer regards as repugnant. The lawyer's freedom to select clients is, however, qualified. All lawyers have a responsibility to assist in providing pro bono publico service. See Rule 6.1. An individual lawyer fulfills this responsibility by accepting a fair share of unpopular matters or indigent or unpopular clients. A lawyer may also be subject to appointment by a court to serve unpopular clients or persons unable to afford legal services.

### **Appointed Counsel**

[2] For good cause a lawyer may seek to decline an appointment to represent a person who cannot afford to retain counsel or whose cause is unpopular. Good cause exists if the lawyer could not handle the matter competently, see Rule 1.1, or if undertaking the representation would result in an improper conflict of interest, for example, when the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client. A lawyer may also seek to decline an appointment if acceptance would be unreasonably burdensome, for example, when it would impose a financial sacrifice so great as to be unjust.

[3] An appointed lawyer has the same obligations to the client as retained counsel, including the obligations of loyalty and confidentiality, and is subject to the same limitations on the client-lawyer relationship, such as the obligation to refrain from assisting the client in violation of the Rules.



**Rule 15. Expert witnesses and interpreters.**

a) The court may appoint any expert witness agreed upon by the parties or of its own selection. An expert so appointed shall be informed of his duties by the court in writing, a copy of which shall be filed. An expert so appointed shall advise the court and the parties of his findings and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court shall determine the reasonable compensation of the expert and direct payment thereof. The parties may call expert witnesses of their own at their own expense. Upon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, the witness fee shall be paid as if he were called on behalf of the prosecution.

b) The court may appoint an interpreter of its own selection and shall determine reasonable compensation and direct payment thereof. The court may allow counsel to question the interpreter before he is sworn to discharge the duties of an interpreter.

# **ADDENDUM 4**

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Telephone: (801) 205-9049

Co-Counsel for Defendant

**IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

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STATE OF UTAH,	)	<b>MOTION TO DECLARE</b>
	)	<b>DEFENDANT INDIGENT AND TO</b>
Plaintiff,	)	<b>PROVIDE AN INVESTIGATOR</b>
	)	<b>AND EXPERT WITNESS AT</b>
vs.	)	<b>STATE EXPENSE</b>
	)	
RANDY JEFFS,	)	Case No. 081903791
	)	
Defendant.	)	Judge Barrett
	)	

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COMES NOW defendant, through counsel, and moves this Court for an order declaring him indigent and to provide defendant with an investigator and expert witnesses at state expense. This motion is based upon the following:

1. Defendant has been incarcerated in the Salt Lake County Adult Correctional Facility since May, 2008. At the time of his incarceration, he lost his full-time employment and has earned no income since his incarceration. As of the date of this motion, he has been incarcerated approximately nine months.

2. Partially due to the order prohibiting any contact between defendant and his wife

prohibiting them from working together to find a solution to their tremendous financial difficulties, defendant's home has gone into foreclosure and defendant and his wife are bound to lose everything. Moreover, defendant's financial problems have been exacerbated by the fact that defendant's wife has been unemployed most of the time he has been incarcerated.

3. Based upon the opinion of defendant's counsel, it is necessary to hire an investigator to conduct interviews of the various police officers involved in order to avoid defendant's counsel from becoming witnesses and to perform other investigatory tasks essential for his defense.

4. Moreover, due to the paths of the bullets allegedly fired by defendant and the fact that defendant has been charged with intentionally attempting to kill various police officers, it is essential to the defense of defendant that a ballistic expert be retained in order to assist defendant with his defense.

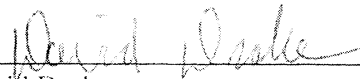
5. Prior to the episode leading to his arrest, defendant inadvertently ingested various quantities of prescription drugs and alcohol, which, in the opinion of defendant substantially altered his mental state to the point that he has no recollection of the events leading to his arrest. Consequently, it is part of his defense that an medical expert be retained concerning the effects of such prescription medications – their interaction with each other and the quantity taken – along with their interaction with alcohol – in order to assist defendant with his defense.

Due to defendant's indigent status, he is unable to pay for these experts and investigator on his own. These experts and investigator are critical to his defense. Therefore, it is respectfully requested that these experts and investigator be appointed for and in behalf of defendant.



RESPECTFULLY SUBMITTED this 9<sup>th</sup> day of February, 2009.

DAVID DRAKE, P.C.  
Attorney for Defendant

  
\_\_\_\_\_  
David Drake

### CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on February 9, 2009 a true and correct copy of the foregoing motion to declare defendant indigent and to provide experts and investigator for defendant was served via hand-delivery on the following counsel of record:

Michaela Andruzzi, Esq.  
Salt Lake County District Attorney's Office  
111 East Broadway, Suite 400  
Salt Lake City, UT 84111  
(Fax: 801/366-7828)

And the Original filed via LMI with:

Judge William W. Barrett  
Third District Court  
Salt Lake Department  
450 South State Street  
Salt Lake City, UT 84111

By:   
\_\_\_\_\_

DAVID DRAKE, USB # 0911  
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Co-Counsel for Defendant

**IN THE THIRD DISTRICT COURT OF THE STATE OF UTAH  
SALT LAKE COUNTY, SALT LAKE DEPARTMENT**

---

STATE OF UTAH,	)	<b>SUPPLEMENT TO MOTION</b>
	)	<b>TO DECLARE DEFENDANT</b>
Plaintiff,	)	<b>INDIGENT AND TO PROVIDE AN</b>
	)	<b>INVESTIGATOR AND EXPERT</b>
vs.	)	<b>WITNESSES AT STATE EXPENSE</b>
	)	
RANDY JEFFS,	)	Case No. 081903791
	)	
Defendant.	)	Judge Barrett
	)	

---

COMES NOW defendant, through counsel, and pursuant to Court order files this supplement to defendant's motion to declare defendant indigent and to provide an investigator and expert witness at state expense. The trial court has indicated that it may be persuaded by the state's argument concerning the application of the Indigent Defense Act, querying whether *State v. Burns*, 2000 UT 56, 4 P.3d 795 is still good law. *Burns* has been upheld by the Utah Court of Appeals as recently as April, 2009 in *State v. Barber*, 2009 UT App 91, a copy of which is appended to this supplement. Consequently, the state's arguments to the contrary, defendant's indigency motion should be granted and that an investigator and expert witnesses be provided to him at state expense..

This supplement incorporates hereat defendant's original motion to declare him indigent and to provide an investigator and expert witness at state expense. The original motion is supplemented as follows:

1. The providing of an investigator is absolutely essential to defendant's defense. First, defendant opted to defer the preliminary hearing in order to directly interview the police witnesses. The state agreed to this. However, defendant's attorney cannot interview these witnesses, since to do so, would violate his ethical duties not to place himself in a position where he could be called as a witness. For example, in the event the state's police witnesses stated something at trial that differed from what they stated to counsel during the interview, counsel would likely be called as a witness to impeach the statement. That would disqualify defense counsel to act as an attorney for defendant.

2. Second, neighbors have to be investigated as to what they witnessed. Again, as in the above-example, if defense counsel conducted the interviews, he would be potential witness. It is essential to the defense to have these neighbors interviewed since several of them were eye-witnesses. One neighbor had to have a bullet extracted from her car. It is necessary to interview that witness to ascertain where the bullet came from and what happened to it after the extraction.

3. Third, medical personnel who initially saw and treated defendant must be investigated. This includes paramedics, helicopter crew members, officers attending defendant's wounds, healthcare providers at the hospital where defendant was taken, and those who worked in the lab at the hospital. The information that could be culled from this investigation is critical to the defense. Again, defense counsel cannot do it because of the potential of becoming a witness.

4. Fourth, a ballistics expert witness should be provided. Defendant has been charged with several first degree felonies based upon his shooting at police officers. Lack of intent is critical

to the defense. A ballistic expert is required to assist in establishing this. There are issues of stippling, the angle of the bullets fired from defendant's pistol, information concerning the bullet taken from the neighbor's car, and other very material, essential, and relevant facts concerning the shooting. Of course, as the investigation progresses, the need for such an expert will increase.

5. Fifth, medical experts should be provided. The actions of defendant on the day in question are an anomaly. The prescription medications defendant was taking affected his capacity to understand what was occurring. It is essential for an expert to be provided in order to testify about defendant's diminished capacity, an expert to testify concerning the side-effects of the prescription drugs he was taking and the side-effects these drugs have with each other when taken together, and the effect such would have on the mental capacity of defendant. Medical experts are also essential for the defense concerning defendant's blood work on the night in question and how the results of his blood work would affect his condition. Moreover, such experts are needed to ascertain the blood levels of the involved police and how this affected their performance and perception. *See Ake v. Oklahoma*, 470 U.S. 68 (1985) 105 S.Ct. 1087 [state to provide psychiatrist].

It is submitted that if that portion of the Indigent Defense Act ("Act") that applies to the providing of defense resources is only applied to defendants represented by the LDA as suggested by the state, and not to other indigent defendants, especially those who become indigent after their arrest and incarceration, such a strictured view violates defendant's rights of due process since he is not treated as other indigent defendants. Moreover such a narrow view would have the effect of forcing defendant to choose between the counsel he originally hired prior to becoming indigent or firing that attorney to have an LDA appointed so he could benefit from the Act and have defense resources provided him. This clearly violates defendant's 6<sup>th</sup> amendment rights to have the effective

assistance of counsel (as well as Rule 15, U.R.Crim.P.). Part and parcel of this 6<sup>th</sup> amendment right is the right to choice of counsel. *See U.S. v. Gonzalez-Lopez*, 548 U.S. 140 (2006), 126 S.Ct. 2557 [“In sum, the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'” “The right to select counsel of one's choice, by contrast, has never been derived from the Sixth Amendment's purpose of ensuring a fair trial. It has been regarded as the root meaning of the constitutional guarantee.”] The U.S. Supreme Court then stated:

Deprivation of the right is "complete" when the defendant is erroneously prevented from being represented by the lawyer he wants, regardless of the quality of the representation he received. To argue otherwise is to confuse the right to counsel of choice — which is the right to a particular lawyer regardless of comparative effectiveness — with the right to effective counsel — which imposes a baseline requirement of competence on whatever lawyer is chosen or appointed.

*Id.* at 148.

The fact is that defendant is indigent. He is indigent under the guidelines of the Act. He cannot afford the defense resources essential to his defense because he is now indigent. On the other hand, were he represented by the LDA, he would have all of the Act's defense resources available to him. According to the argument of the state, he must fire his attorney of choice in order to qualify for these defense resources. Not only is that a violation of his rights of equal protection (those indigent defendants represented by the LDA are treated differently than he because he initially had the money to hire a private attorney but, due to his incarceration, he is now indigent and not able to afford the defense resources he would have if represented by the LDA), it is also in violation of defendant's 6<sup>th</sup> amendment right to counsel which necessarily includes the right to have counsel of his choosing. He should not be forced to choose between his 6<sup>th</sup> amendment right and to have the

resources for an effective defense.

This Court manifested an opinion that due to the amendments in the Act since *State v. Burns*, 2000 UT 56, 4 P.3d 795, *State v. Burns* is no longer controlling. That is not the case. *State v. Barber*, 2009 UT App 91, filed April 9, 2009, reaffirmed the holding in *State v. Barber*. The defendant in *Barber* hired private counsel but was unable to hire Dr. Rothfeder as an expert witness, which private counsel admitted that “an expert would have been 'very' helpful in preparing the defense but that one was not hired because Barber lacked sufficient funds to pay an expert's fees”.

Regarding the decision in *Burns*, the *Barber* Court stated:

Rule 15 of the Utah Rules of Criminal Procedure provides that '[u]pon showing that a defendant is financially unable to pay the fees of an expert whose services are necessary for adequate defense, **the witness fee shall be paid as if he were called on behalf of the prosecution.**' Utah R. Crim. P. 15(a). Furthermore, **Utah law guarantees indigent defendants "public assistance for expert witnesses" irrespective of whether they are represented by the LDA or private counsel. See *State v. Burns*, 2000 UT 56, ¶¶ 31-32, 4 P.3d 795 ("There is no indication in [rule 15] that a defendant must be represented by [the] LDA to qualify for this assistance.'). [Emphasis added.]**

*Id.* at ¶ 21.

It is clear from *Barber* that 1) *Burns* remains good law; and 2) Utah laws guarantees indigent defendants public assistance for expert witnesses irrespective of whether they are represented by the LDA or private counsel; consequently, defendant is entitled to the have the county pay for this defense resource.

In accord, *Schmidt v. Uhlenhopp*, 258 Iowa 771, 140 N.W.2d 118 (1966) (dissenting opinion) ["It would be strange if the Constitution required the government to furnish both counsel and investigative services in cases where the indigent needs and requests public payment for only investigative services. The State's theory would impose an unreasonable and unnecessary additional

burden on the public treasury.” (Citing *Burns* with approval]; and *State v. Schoonmaker*, 143 N.M. 373, 176 P.3d 1105 (2008) [“We note that most states that have interpreted their indigent defense statutes in similar cases have held that indigent defendants are not required to be represented by the public defender in order to receive state funding for ancillary services that comprise 'the basic tools of an adequate defense.' (Citing *Burns* with approval.)]

### CONCLUSION

Based upon the foregoing, *Burns* is still good law and should be applied to this case. Moreover, Rule 15, U.R.Crim.P., mandates that the county pay defendant's costs for his defense resources. *Barber* reaffirmed *Burns*. Defendant is indigent. As such, he is entitled to have the county pay for his defense resources. Consequently, his motion for such should be granted.

DATED June 15, 2009.

DAVID DRAKE, P.C.  
Attorney for Defendant

  
\_\_\_\_\_  
David Drake

### CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on June 15, 2009 a true and correct copy of the foregoing supplement to defendant's motion to declare defendant indigent and to provide experts and investigator for defendant was served via electronic means (permission to do so granted by Mr. Wangsgard) on the following counsel of record:

Craig Wangsgard, Esq.  
2001 South State St., # S3600  
Salt Lake City, UT 84190-1200

And the Original filed with:

Judge William W. Barrett  
Third District Court  
Salt Lake Department  
450 South State Street  
Salt Lake City, UT 84111

By: David Drake



# **ADDENDUM 5**

4/6  
**ORIGINAL**

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**IN THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT**

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STATE OF UTAH

Plaintiff,

vs.

RANDY FETCH JEFFS,

Defendant.

**MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION TO  
PROVIDE AN INVESTIGATOR AND  
EXPERT WITNESSES AT STATE  
EXPENSE**

Case No. 081903791  
Judge William W. Barrett

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Salt Lake County<sup>1</sup>, by and through its attorneys, respectfully submits this Memorandum in Opposition to Defendant's Motion to Provide an Investigator and Expert Witnesses at State Expense on the following grounds:

1. Under the provisions of the Utah Indigent Defense Act (the "Act"), U.C.A. 77-32-101 et. seq., Salt Lake County has contracted with the Salt Lake Legal Defender Association

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<sup>1</sup> Salt Lake County is the legal entity which has the statutory responsibility to provide for the defense of indigent defendants in this case, pursuant to the Utah Indigent Defense Act, U.C.A. 77-32-101, et seq. Salt Lake County is represented by the Civil/Litigation Division of the District Attorney's Office, which division is entering its appearance for the purposes of opposing this motion only and not for the prosecution.

(“LDA”) to provide for the legal defense of indigent defendants, including defense resources and counsel. Accordingly, under Section 77-32-306(4) of the Act, LDA is the “exclusive source” from which indigent legal defense, including indigent defense resources, may be provided in this case, unless the Court finds a “compelling reason” to authorize or designate a noncontracting attorney or defense resource for the indigent defendant.

2. Assuming for the sake of argument that the Defendant is indigent under the procedures and standards set forth in Section 77-32-202 of the Act, there is no “compelling reason” which would justify the Court to authorize or designate a non-contracting attorney or defense resource for the defense in this case, pursuant to the provisions of Sections 77-32-302(2)(b) and (c), 77-32-303 and 77-32-306(4), U.C.A.

#### STATEMENT OF FACTS

1. The Amended Information in this case charges the Defendant with Attempted Aggravated Murder, a 1<sup>st</sup> degree felony, (four counts): together with four additional charges, including Discharge of Firearm from a Vehicle, Domestic Violence in the Presence of a Child, Reckless Endangerment, and Interference with Arresting Officer. [Court Record]

2. On May 20, 2008, at the Defendant’s initial appearance, the Court found the Defendant indigent and appointed the Salt Lake Legal Defender Association (“LDA”) to represent the Defendant. [Court Record]

3. Subsequently, on July 8, 2008, private counsel, David Drake, filed his Appearance of Counsel. [Court Record]

4. On February 9, 2009, private counsel filed a “Motion to Declare Defendant Indigent and to Provide an Investigator and Expert Witness[es] at State Expense.” The Motion asks the Court to appoint: (1) an investigator to conduct interviews of “various police officers” and to perform “other investigatory tasks”; (2) a ballistic expert “due to the paths of the bullets allegedly fired by defendant and the fact that defendant has been charged with intentionally attempting to kill various police officers”; and (3) a medical expert to testify concerning the allegation that “defendant inadvertently ingested various quantities of prescription drugs and alcohol which, in the opinion of defendant substantially altered his mental state to the point that he has no recollection of the events leading to his arrest.” [Defendant’s Motion]

5. Defendant’s Motion contains no legal authority for the request and is not accompanied by any memorandum containing any such legal authority. [Defendant’s Motion]

6. Salt Lake County, pursuant to its statutory responsibility to provide for the legal defense of indigents, including defense resources and counsel, has contracted with the Salt Lake Legal Defender Association (“LDA”). Under the terms of the Agreement for Services (“Agreement”), the LDA has the responsibility to contract with investigators, medical professionals and other expert resources necessary for a complete defense as set forth in Section 77-32-301, U.C.A. The LDA is a well qualified firm that has provided quality legal defense services to indigent defendants for many years. [The Agreement, attached hereto as Exhibit 1]

## ARGUMENT

### I

THE LDA IS THE “EXCLUSIVE SOURCE” FROM WHICH THE INDIGENT LEGAL DEFENSE, INCLUDING DEFENSE RESOURCES, MAY BE PROVIDED IN THIS CASE. UNLESS THE COURT, AFTER NOTICE AND HEARING, FINDS A “COMPELLING REASON” FOR THE APPOINTMENT OF A NONCONTRACTING ATTORNEY OR DEFENSE RESOURCE.

The provisions of the Utah Indigent Defense Act govern not only the procedures and standards for the determination of the indigence of a criminal defendant, but also the procedures and standards for the Court to appoint counsel and provide for indigent defense resources.

Section 77-32-302(2)(b) of the Act establishes the following rule:

“If the county or municipality responsible to provide for the legal defense of an indigent, including defense resources and counsel, has arranged by contract to provide those services through a legal aid association, and the court has received notice or a copy of the contract, the court shall assign the legal aid association named in the contract to defend the indigent and provide defense resources.” (Emphasis added).

Although this appointment to defend and “provide defense resources” appears to be mandatory, there is a limited exception to the rule set forth in Section 77-32-302(2)(e):

“If the court considers the assignment of a noncontracting attorney or defense resource to provide legal services to an indigent defendant despite the existence of an indigent legal services contract and the court has a copy or notice of the contract, before the court may make the assignment, it shall:

- (i) set the matter for a hearing;
- (ii) give proper notice of the hearing to the attorney of the responsible county or municipality; and
- (iii) make findings that there is a compelling reason to appoint a noncontracting attorney or defense resource.” (Emphasis added).

In this case, Defendant's Motion fails to address this "compelling reason" standard for the appointment of the requested noncontracting investigator and expert witnesses. In fact, Defendant's Motion ignores the provisions and requirements set forth in the Indigent Defense Act.

Under the provisions of the Act, in establishing the legal standard for the court to appoint a noncontracting attorney or defense resource, the Legislature makes specific reference to Rule 15, Utah Rules of Criminal Procedure, and Section 78B-1-151 (expenses for expert witnesses) and makes them subject to the "compelling reason" standard<sup>2</sup>.

Section 77-32-303 provides:

"If a county or municipality has contracted for, or otherwise made arrangements for, the legal defense of indigents, including a competent attorney and defense resources, the court may not appoint a noncontracting attorney or resource either under this part, Section 78B-1-151, or Rule 15, Utah Rules of Criminal Procedure, unless the court:

- (1) conducts a hearing with proper notice to the responsible entity to consider the authorization or designation of a noncontract attorney or resource; and
- (2) makes a finding that there is a compelling reason to authorize or designate a noncontracting attorney or resources for the indigent defendant." (Emphasis added).

In enacting the "exclusive source" provision set forth in Section 77-32-306(4), the Legislature showed a clear intent to provide counties and municipalities a means to effectively manage the costs for providing legal defense and defense resources for indigent defendants through contracting with LDA and legal aid associations.

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<sup>2</sup> As a historical note, in State v. Burns, 4 P.3d 795 (Utah 2000), which was decided under the 1992 version of the Indigent Defense Act, the Court held that neither the Act nor Rule 15 Utah R. Crim. P. require that an indigent defendant be represented by the LDA to qualify for public assistance for expert witnesses provided there is proof of necessity and establishment of indigence. However, the following year after the Burns decision, the Utah Legislature amended the Indigent Defense Act in Senate Bill 154 (2001) for the purpose of overturning the Burns decision. Under the revised and current version of the Act, a court must find a "compelling reason" prior to authorizing either "legal counsel" or a "defense resource" (such as an investigator or expert witness) outside of the LDA contract. Specifically, the Act now provides "The indigent's preference for other counsel or defense resources may not be considered a compelling reason justifying the appointment of a noncontracting attorney or defense resource."

Further, the Act clearly reflects a legislative intent in favor of the “exclusive source” method of contracting when it provides that “The indigent’s preference for other counsel or defense resources may not be considered a compelling reason justifying the appointment of a noncontracting attorney or defense resource.” (Emphasis added). Section 77-32-302(2)(f), U.C.A.

## II

THERE IS NO “COMPELLING REASON” WHICH WOULD JUSTIFY THE COURT IN GOING OUTSIDE OF THE LDA CONTRACT TO AUTHORIZE OR DESIGNATE A NON-CONTRACTING ATTORNEY OR DEFENSE RESOURCE FOR THE DEFENSE IN THIS CASE.

In order for the Court to go outside of the LDA contract to authorize and designate a noncontracting defense resource in this case, the defense must provide a “compelling reason” sufficient to allow the Court to make findings on the record. The Defendant’s Motion fails to address the “compelling reason” standard established in the Act.

As stated above, the Act provides that the Defendant’s preference for other counsel, such as Mr. Drake, or other defense resources, such as those requested here, may not be considered a “compelling reason” justifying a defense resource outside of the contract.

In addition, the Act also defines “compelling reason” in Section 77-32-201(2) to include the following circumstances:

- “(a) a conflict of interest;
- (b) the contracting attorney does not have sufficient expertise to provide an effective defense of the indigent; or
- (c) the defense resource is insufficient or lacks expertise to provide a complete defense.”

A. CONFLICT OF INTEREST. In applying these circumstances to the present case, there is no allegation that the LDA has a conflict of interest. It should be noted also that the LDA Agreement provides for conflict cases, so that it is the responsibility of the LDA to hire and pay for conflict counsel and defense resources in conflict cases where the LDA has a conflict of interest which would prevent the LDA from representing an indigent defendant in a case. Accordingly, a conflict of interest is not a "compelling reason" in this case which would justify going outside of the contract.

B. LACK OF SUFFICIENT EXPERTISE. With regard to the second circumstance relating to insufficient expertise of the contracting attorney, this would not apply to this case because the Defendant has retained his own private counsel. In addition, there is no evidence or allegation that LDA attorneys do not have sufficient expertise to provide an effective defense in this case.

C. SUFFICIENCY OF DEFENSE RESOURCE. With regard to the third circumstance relating to the sufficiency of the defense resource or the lack of expertise to provide a complete defense, there should be little question that the LDA is well qualified to provide quality legal defense resources to indigent defendants and has the resources and expertise to contract with qualified investigators, medical professionals and other expert witnesses and resources necessary for a complete defense.

Because the County has already paid the LDA under the existing Agreement to provide all required legal services and resources for all indigent defendants in Salt Lake County, any order requiring payment for services and resources outside of the contract, as requested by the



Defendant, would result in the County having to pay twice for the defense resources in this case, i.e. a double payment.

The Defendant's preference in this case for other counsel (Mr. Drake) or other defense resources (the requested "investigator", "ballistic expert", and "medical expert") outside of the LDA contract cannot legally be considered a "compelling reason" justifying the appointment of the Defendant's desired defense resources at County expense (Section 77-32-302(2)(f), U.C.A.).

#### CONCLUSION

The provisions of the Utah Indigent Defense Act govern not only the procedures and standards for the determination of the indigence of a criminal defendant, but also the procedures and standards for the Court to appoint counsel and provide for indigent defense resources.

Salt Lake County has contracted with the Salt Lake Legal Defender Association to provide for the legal defense of indigent defendants, including defense resources and counsel. Accordingly, under Section 77-32-306(4) of the Act, LDA is the "exclusive source" from which indigent legal defense, including indigent defense resources, may be provided in this case, unless the court finds a "compelling reason" to authorize or designate a noncontracting attorney or defense resource for the indigent defendant. In the absence of such evidentiary showing and resulting finding of a "compelling reason" by the Court, the County is not authorized to use taxpayer funds for such purpose and any payment by the County for such purpose would be unlawful.

Under the procedures and standards set forth in the Act, there is no "compelling reason" which would justify the Court to authorize or designate a non-contracting attorney or defense

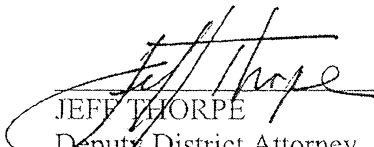
resource for the defense in this case. The Act specifically provides that an indigent defendant's preference for other counsel, such as Mr. Drake, or other defense resources, such as the specific investigator and expert witnesses requested here, may not be considered a "compelling reason" justifying the appointment of a noncontracting attorney or defense resource.

The LDA is well qualified to provide indigent legal defense, including defense resources, to indigent defendants and has the resources and expertise to contract with qualified investigators, medical professionals and other expert resources necessary for a complete defense.

For the reasons set forth above, Salt Lake County respectfully requests that Defendant's Motion be denied.

DATED this 19th day of February, 2009.

LOHRA L. MILLER  
SALT LAKE COUNTY DISTRICT ATTORNEY

  
JEFF THORPE  
Deputy District Attorney  
Civil/Litigation Division

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 17 day of February, 2009, I caused a true and correct copy of the foregoing Memorandum in Opposition to Defendant's Motion for State to Fund Expert Witness to be mailed, postage prepaid, to the following:

David Drake  
David Drake, P.C.  
6905 South 1300 East, #248  
Midvale, Utah 84047

Michaela Andruzzi  
Deputy District Attorney  
District Attorney's Office  
111 East Broadway, Suite 400  
Salt Lake City, Utah 84111

Patrick L. Anderson  
Salt Lake Legal Defender Association  
424 East 500 South, #300  
Salt Lake City, Utah 84111

By \_\_\_\_\_



# EXHIBIT 1

County Contract # SG04012C  
District Attorney #2004-1644

AGREEMENT FOR SERVICES

THIS AGREEMENT is made and entered into this 28 day of December 2004, by and between SALT LAKE COUNTY, a body corporate and politic of the state of Utah, hereinafter referred to as "COUNTY", and SALT LAKE LEGAL DEFENDER ASSOCIATION, a non-profit corporation of the state of Utah, hereinafter referred to as "LEGAL DEFENDERS".

WITNESSETH:

WHEREAS, the Legislature of the state of Utah in 1981 enacted Title 77, Chapter 32, Utah Code Annotated 1953, as amended, entitled "Indigent Defense Act," which Act sets minimum standards for the defense of persons charged with crimes who face the possibility of deprivation of liberty within the state, who are legally indigent and financially unable to obtain an adequate defense thereof; and

WHEREAS, Utah Code Ann. § 77-32-306, (1953 as amended), allows COUNTY to provide the legal services prescribed by the Act through non-profit legal aid associations; and

WHEREAS, SALT LAKE COUNTY Ordinance Section 2.76.010 et seq. provides that COUNTY shall discharge its obligation to provide legal counsel and investigators and defense support services to indigent defendants by contracting yearly with SALT LAKE LEGAL DEFENDERS ASSOCIATION.

WHEREAS, LEGAL DEFENDERS has been established and is able to provide legal representation for indigent defendants as provided by law.

NOW, THEREFORE, the parties hereto agree as follows:

1. CONSIDERATION

A. COUNTY does hereby engage LEGAL DEFENDERS to perform the services recited and set forth herein and to pay to LEGAL DEFENDERS for said services the sum of \$7,461,195.00 for the period of January 1, 2005 through December 31, 2005. The money shall be made available in two payments according to terms and conditions of this agreement as follows:

\$3,730,597.50 to be advanced on or before January 15, 2005; and

\$3,730,592.50 to be advanced on or before July 1, 2005.

B. It is understood and agreed that the maximum total cost of this agreement, excluding the provisions of paragraphs 2B in regard to habeas corpus, and 4 and 5 below, shall not exceed \$7,461,195.00. Said total cost shall be inclusive of all professional fees and expenses that may be incurred by LEGAL DEFENDERS. Costs for transcripts and reporter services on appeal or in other cases shall be borne by LEGAL DEFENDERS at no additional charge to COUNTY.

C. LEGAL DEFENDERS agree to submit a written invoice to COUNTY's Contract Manager at least thirty (30) days prior to the date of the next semi-annual payment date and following the receipt of said invoice by COUNTY, said payment may be processed by COUNTY.

2. SERVICES TO BE RENDERED

A. LEGAL DEFENDERS shall perform the legal services required hereunder in a professional and ethical manner under guidelines and standards as set forth in the Rules of Professional Conduct, Canons of Judicial Conduct, and other such regulations and statutes as shall govern the practice of law in the state of Utah together with such other regulations or

statutory provisions to which LEGAL DEFENDERS may be subject as a result of federal law.

B. (1) LEGAL DEFENDERS agree to provide legal advice and representation at all stages of the proceedings, to indigent persons entitled thereto as indicated in this agreement after appointment by a Judge of the Justice Court of Salt Lake County, the District Court of Salt Lake County, or the Court of Appeals, or by a Justice of the Supreme Court of Utah, provided the person is charged under the laws of the State of Utah with a felony, misdemeanor, or probation violation for any offense committed in Salt Lake County, or is seeking a first right of appeal to the District Court, Court of Appeals, or Supreme Court of the State of Utah pursuant to the provisions of the Utah Code Ann. § 77-32-301. LEGAL DEFENDERS agree to provide the aforementioned service with respect to each and every indigent person entitled thereto after court appointment, except in those cases where, as defined herein, a legal conflict of interest exists such as would preclude counsel from rendering his undivided loyalty to the client as provided in Utah Code Ann. § 77-32-301, et seq.

(2) LEGAL DEFENDERS further agrees to provide legal advise and representation to all indigent persons entitled thereto who are seeking a writ of habeas corpus to obtain release from the Salt Lake County Jail and, accordingly, LEGAL DEFENDERS need not obtain court appointment prior to or as a condition of providing such legal advice and services notwithstanding any other provision of this agreement. The parties agree that the consideration paid the LEGAL DEFENDERS under paragraph 1 or the amount of the Conflicts Fund under paragraph 4 may be increased by such amount as will be reasonably necessary to provide habeas corpus services.

C. LEGAL DEFENDERS agree that there shall be no representation of a person by

LEGAL DEFENDERS prior to an actual court appointment or otherwise outside the terms of this agreement.

D. LEGAL DEFENDERS agree to submit itemized quarterly reports reflecting:

(1) New Cases Received During Quarter

- a. Felony
- b. Misdemeanor, State Offenses
- c. City and County Ordinance Misdemeanor
- d. Appeals

(2) Total Pending Cases -- each category above

(3) Total Cases Closed During the Quarter -- Disposition

- a. Trial
- b. Plea
- c. Dismissal

(4) Full-time equivalent attorneys working during the quarter assigned to felony, misdemeanor, city ordinances and appeals.

(5) Number of conflict-of-interest cases referred during the quarter and reason for the referral.

(6) Actual court appointments of LEGAL DEFENDERS made during the quarter, listing the date and time of each appointment.

E. LEGAL DEFENDERS agree, upon reasonable notice, to allow COUNTY access to books and records for the purpose of auditing LEGAL DEFENDERS' use of public funds. This does not apply to confidential client files.

3. CONFLICT OF INTEREST



A. A conflict-of-interest, such as would allow LEGAL DEFENDERS to withdraw pursuant to this agreement, must be of such a nature as to be proscribed by case law, statute, or the Rules of Professional Conduct. It is agreed by the parties that a conflict-of-interest does not include withdrawals occasioned by defendant's request for counsel of his choice or disagreements with or dislikes of appointed counsel. It is further agreed that any withdrawals from clients for other than an actual legal conflict-of-interest will require LEGAL DEFENDERS to pay for additionally-appointed counsel from the sum of money provided by COUNTY in paragraph 4.

B. LEGAL DEFENDERS further agree that if, in their opinion, such a conflict exists, the facts and circumstances so far as practicable, without disclosing confidences, will be presented, after notice has been given to the Salt Lake County District Attorney's Office and to the appropriate judge who has jurisdiction over the case for determination as to whether such a conflict, in fact, exists. If such court concludes that there is, in fact, a conflict-of-interest, LEGAL DEFENDERS will be relieved of the responsibility of providing legal advice and representation for such defendant, except as otherwise provided for in this agreement.

#### 4. CONFLICTS FUND

COUNTY also agrees to pay LEGAL DEFENDERS the sum of \$458,700.00 for payment of costs and representation of defendants when non-LEGAL DEFENDERS attorneys are appointed to represent defendants in conflict-of-interest cases as defined herein. Any amount required to be expended above that sum for conflict-of-interest cases shall be paid from the sum provided LEGAL DEFENDERS in paragraph 1. LEGAL DEFENDERS shall pay for conflict-of-interest counsel only after a court order allowing withdrawal of LEGAL DEFENDERS and appointment of conflict counsel. Payments shall be made to appointed counsel or counsel.

retained on a contract to do conflict-of-interest cases pursuant to that contract. Appointment of counsel for conflict-of-interest on capital murder cases is excluded from this agreement to the extent that the above budget figure is exceeded. Any amount remaining in the conflict-of-interest account to be maintained by LEGAL DEFENDERS, after the payment of all legal fees and associated costs resulting from the appointment of conflicts counsel incurred during the calendar year, shall become the sole and exclusive property of LEGAL DEFENDERS. The sum shall be paid semi-annually as follows:

\$229,350.00 to be on or before January 15, 2005; and

\$229,350.00 to be advanced on or before July 1, 2005.

5. OUT-OF-STATE WITNESSES

A. COUNTY agrees to reimburse LEGAL DEFENDERS for actual expenses incurred by LEGAL DEFENDERS in transporting out-of-state witnesses to the state of Utah to attend and testify at a criminal trial where such attendance is obtained in accordance with the provisions of the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Sections 77-21-1 et seq., Utah Code Annotated 1953, as amended. Notice shall be submitted to the Salt Lake County District Attorney advising of the time and place of the court hearings for approval of the need for the witness and expenses associated with securing the attendance of the witness, sufficient to provide COUNTY the opportunity to oppose the requested witness or expenses as appropriate. No funds shall be transmitted until after reasonable documentation has been submitted and approved by the Salt Lake County Auditor, such documentation to include a copy of the court order or certificate approving the need for the witness and a copy of the court's approval of the expenses.

B. COUNTY agrees to provide \$15,000.00 to cover expenses incurred in

transporting out-of-state witnesses or for other extraordinary expenses. The Contract Manager is empowered to approve expenses exceeding \$15,000.00 for good cause shown, subject to appropriate adjustments to the budget allocation by Salt Lake County. Application for reimbursements from this amount shall be as provided in paragraph 5.A. for out-of-state witnesses or with such documentation as COUNTY may request for other extraordinary expenses.

6. AFFIDAVIT OF INDIGENCY

LEGAL DEFENDERS shall cooperate with the courts to obtain an affidavit from the individual defendant averring his/her inability to pay for private counsel. The affidavit shall comply with the requirements of Utah Code Ann. § 77-32-202 (1953, as amended). LEGAL DEFENDERS agree that they shall not act in a case until the court has issued its order of appointment. LEGAL DEFENDERS further agree to provide information to the court and the Criminal Justice Services Division of Salt Lake County concerning any changes with regard to the indigency status of a defendant which changes would affect the qualifying of the defendant for court-appointed counsel. LEGAL DEFENDERS also agree to assist the courts and the Salt Lake County District Attorney's Office in providing information necessary to recover costs pursuant to Utah Code Ann. § 77-32-202(6), including maintaining individual case records which reflect costs and types of services as ordered by the court.

7. CONTRACT MANAGER

It is agreed that the responsible party representing COUNTY in the administration and management of this agreement shall be the Chief Administrative Officer or designee, herein referred to as "Contract Manager".

8. SALARY SCALE

LEGAL DEFENDERS agree to maintain a salary scale, insofar as possible, comparable to salaries of state or COUNTY legal officers in Salt Lake COUNTY with such increases as may be required, subject to the restriction that lawyers of LEGAL DEFENDERS will not engage in private practice and shall not represent clients in any civil action against COUNTY or participate in or receive any financial remuneration from any source as a result of any civil action against COUNTY.

9. LEGAL DEFENDERS ASSOCIATION BUDGET

LEGAL DEFENDERS shall prepare a budget and apply the funds received from the COUNTY toward payment of the operating costs (salaries and overhead), on a pro rata basis, which are incurred during the 365-day period as is set forth in LEGAL DEFENDERS' BUDGET, which shall be formally approved by the COUNTY for fiscal year 2005 and yearly thereafter.

10. TERM OF CONTRACT

The parties agree that the term hereof shall extend for the period set out in paragraph 1, but that said term is automatically extended yearly unless terminated as provided in Section 12 below. For each yearly extension LEGAL DEFENDERS shall submit yearly budgets as provided herein. The COUNTY's annual appropriation shall be determined yearly at the time the COUNTY adopts its budget.

11. RESOURCE COMMITMENT

LEGAL DEFENDERS agree that, for the period of this agreement, it will dedicate attorney resources at least equivalent to that set forth in its yearly LEGAL DEFENDER'S BUDGET, approved by COUNTY. LEGAL DEFENDERS, during the contract period, shall retain the numbers of attorneys and other staff as indicated in that BUDGET. LEGAL DEFENDERS will not use COUNTY funds to finance or support legal defense services for any

other governmental entities

12. TERMINATION

The parties agree that either party shall have the right at any time after the effective date of this contract to terminate this agreement by giving the other party six (6) months notice in writing by registered mail, return receipt requested, specifying the reason or reasons therefor. If notice is so given, this agreement shall terminate upon the expiration of the six (6) months and the liability of the parties hereunder for the further performance of the terms of this agreement shall thereupon cease, but neither party shall be relieved of the duty to perform their obligations up to the date of termination. In the event of termination, the number of calendar days from and including January 1 to the date of termination shall be computed and prorated into the total contract amount. Any funds previously advanced by COUNTY in excess of the amount computed by the above formula shall be returned to COUNTY within 60 days of the date of termination.

13. NON-FUNDING CLAUSE

It is understood and agreed by the parties hereto that funds are not presently available for performance of this agreement by COUNTY. COUNTY's obligation for performance of this agreement is contingent upon funds being appropriated for payments due under this agreement. In the event no funds or insufficient funds are appropriated and budgeted in any fiscal year by COUNTY for payments due under this agreement, for the current or any succeeding fiscal year, this agreement shall create no obligation on COUNTY as to such current or succeeding fiscal years and shall terminate and become null and void on the last day of the fiscal year for which funds were budgeted and appropriated, or, in the event of a reduction in appropriations, on the last day before the reduction becomes effective, except as to those portions or payments herein

then agreed upon for which funds shall have been appropriated and budgeted. Said termination shall not be construed as a breach of or default under this agreement and said termination shall be without penalty, additional payments, or other expense to COUNTY of any kind whatsoever, and no right of action for damages or other relief shall accrue to the benefit of LEGAL DEFENDERS, its successors or assigns, as to this agreement, or any portion thereof, which may so terminate and become null and void.

14. ASSIGNMENT

LEGAL DEFENDERS may not assign or transfer its performance of the agreement, any interest therein, or claim thereunder without the prior written approval of COUNTY.

15. INDEPENDENT CONTRACTOR

LEGAL DEFENDERS agree that it is an independent contractor and that its officers and employees shall not be considered employees or officers of COUNTY nor entitled to any employee benefits as COUNTY employees as a result of the execution of the agreement.

16. INDEMNIFICATION AND INSURANCE

A. LEGAL DEFENDERS shall indemnify COUNTY, its officers and employees against liability for any claim, injury or damage caused by any negligent act or omission of any of LEGAL DEFENDERS' officers, employees, volunteers or agents in the performance of the agreement and shall hold COUNTY harmless from any loss occasioned as a result of the performance of the contract by LEGAL DEFENDERS.

B. LEGAL DEFENDERS agree to maintain such insurance as will fully protect both LEGAL DEFENDERS and COUNTY from any and all claims under the Worker's Compensation Act, from any and all other claims of whatsoever kind or nature for the damage to property or for

personal injury, including death, made by anyone whomsoever, that may arise from operations carried on under this agreement, and from any and all claims of malpractice, including civil rights violations under, but not limited to, Section 1983 of the Federal Civil Rights Act. LEGAL DEFENDERS agree to provide COUNTY with certificates evidencing the required coverage before LEGAL DEFENDERS begin work hereunder and which are attached as part of this agreement. Such insurance shall be provided at LEGAL DEFENDERS' own cost and expense and shall name COUNTY as an additional named insured.

17. NO OFFICER OR EMPLOYEE INTEREST

No officer or employee of COUNTY shall have any pecuniary interest, direct or indirect, in the agreement or the proceeds thereof. No officer or employee of LEGAL DEFENDERS nor any member of their families shall serve on a COUNTY board or committee or hold any such position which either by rule, practice or action nominates, recommends, or supervises LEGAL DEFENDERS' operations, or authorized funding to LEGAL DEFENDERS.

18. MODIFICATION OF CONTRACT

No alteration or variation of the terms of the agreement shall be valid unless made in writing and signed by the parties thereto.

19. DEFAULT

If either party defaults in the performance of the agreement or any of its covenants, terms, conditions, or provisions, the defaulting party shall pay all costs and expenses including a reasonable attorney's fee, which may arise or accrue from enforcing the agreement or from pursuing any remedy provided thereunder.

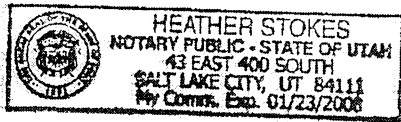
20. DISCRIMINATION





By: Robert A. O'Neil  
Chairman  
Board of Directors

On the 17 day of December, 2004, personally appeared before me D. Gilbert Athay, who being by me duly sworn, did say that he is the Chairman, of Salt Lake Legal Defenders Association, a corporation, and that the foregoing instrument was signed in behalf of said corporation by authority of its Board of Directors, and he acknowledged to me that said corporation executed the same.



(SEAL)



**SALT LAKE  
COUNTY**

CELEBRATING OUR  
SESQUICENTENNIAL  
150 YEARS OF SERVICE  
**1852 - 2002**

**NANCY WORKMAN**  
SALT LAKE COUNTY MAYOR

**HUMAN SERVICES  
DEPARTMENT**  
"Making a positive  
difference"

**KERRY D. STEADMAN**  
DIRECTOR OF HUMAN SERVICES  
ksteadman@co.slc.ut.us

December 20, 2004

Mayor Alan Dayton  
2001 S State St., Ste. 2100  
Salt Lake City, UT 84190

Subject: Agreement with Salt Lake Legal Defenders Association to provide legal services to indigent defendants. **SG04012C**

Please approve and execute the above referenced agreement between Salt Lake Legal Defenders Association and Salt Lake County to provide legal services for indigent defendants and to pay non-Legal Defender attorneys who are appointed in conflict of interest cases.

The fee structure is as follows.

For legal services of indigent defendants:

110-500-5000-4540-NA00	
On or before January 15, 2005	\$3,730,597.50
On or before July 1, 2005	\$3,730,597.50

For conflict of interest fund:

110-500-5000-4542-NA00	
On or before January 15, 2005	\$ 229,350.00
On or before July 1, 2005	\$ 229,350.00

The total in FY 2005 will be \$7,919,895.00.

**DIVISIONS:** Legal Defenders shall prepare a budget yearly and apply the funds received from the County toward operating costs. The term is automatically extended yearly unless terminated as provided in the contract. The annual contract amount shall be that amount approved adopted in the budget by the County Council.

AGING SERVICES

ANIMAL SERVICES

COMMUNITY RESOURCES  
AND DEVELOPMENT

CRIMINAL JUSTICE SERVICES

HEALTH DEPARTMENT

LIBRARY SERVICES

MENTAL HEALTH SERVICES

SUBSTANCE ABUSE SERVICES

YOUTH SERVICES

SALT LAKE COUNTY  
GOVERNMENT CENTER

2001 SOUTH STATE STREET

SUITE N-4300

SALT LAKE CITY

UTAH 84190-2000

PHONE (801) 468-2199

FAX (801) 468-2196

WWW.SLCOHUMAN SERVICES.ORG

*Dave Brenna*  
Dave Brenna  
Mayor Operations

*Kerry D. Steadman*  
Kerry Steadman, Director  
Human Services Department

*Marcus Anjewierden*  
Marcus Anjewierden, Fiscal  
Administrator, Mayor Operations

*Sherry Craig* 12-22-04  
Sherry Craig  
Contracts Manager

*Roh Garner*  
Roh Garner  
Auditor's Office Review

*Mayor Alan Dayton*  
Mayor Alan Dayton, or designee

*12/28/04*  
Date



**SALT LAKE  
COUNTY**

**PETER M. CORROON**  
Salt Lake County Mayor

2001 South State Street  
Suite N2100  
Salt Lake City, UT 84190-1020

801 / 468-2500  
801 / 468-3535 fax

January 3, 2006

Mayor Peter Corroon  
Salt Lake County  
2001 S State Street, Ste. 2100  
Salt Lake City, UT 84190

RE: Salt Lake Legal Defenders Association Agreement for services to  
be rendered in 2006 Contract **SG04012C**.

Submitted for you approval is the above referenced funding request.  
The Salt Lake County Council has approved funding for indigent legal  
criminal representation with the adoption of the final budget for 2006 in  
their meeting on December 6, 2005. Please direct Contracts and  
Procurement to add the following non-encumbered amounts to the  
corresponding commodities in this contract.

Commodity line 2:

Indigent Legal 110-500-4540-2930-NA00 \$ 7,921,652.00

Commodity line 2:

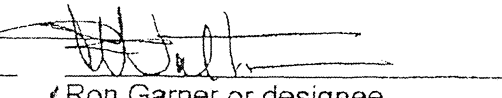
Indigent Legal Conflict 110-500-4542-2930-NA00 \$ 458,700.00

Respectfully,

  
Jean Nielson, Director  
Human Services Department

  
Tammy Stewart, Fiscal Administrator  
Human Service Department

  
Sherry Craig,  
Contracts Manager

  
Ron Garner or designee,  
Auditor Review

  
Mayor Peter Corroon or designee

1/3/06  
Date



**SALT LAKE  
COUNTY**

**PETER M. CORROON**  
Salt Lake County Mayor

**HUMAN SERVICES  
DEPARTMENT**

*"Making a positive difference"*

**Jean Nielsen**  
Director Human Services

**Kelly Colopy**  
Deputy Director Human Services

**DIVISIONS:**

AGING SERVICES

COMMUNITY RESOURCES  
and DEVELOPMENT

CRIMINAL JUSTICE SERVICES

SALT LAKE VALLEY  
HEALTH DEPARTMENT

LIBRARY SERVICES

MENTAL HEALTH SERVICES

SUBSTANCE ABUSE SERVICES

YOUTH SERVICES

December 18, 2006

Mayor Peter Corroon  
Salt Lake County  
2001 S. State Street, Ste 2100  
Salt Lake City, UT 84190

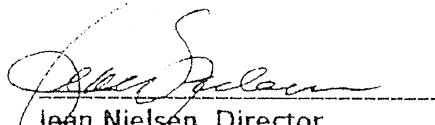
RE: Salt Lake Legal Defenders Association Agreement for services  
to be rendered in 2007 Contract **SG04012C**

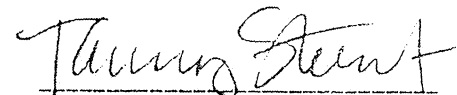
Submitted for your approval is the above referenced funding request. The Salt Lake County Council has approved funding for indigent legal criminal representation with the adoption of the final budget for 2007. Please direct Contracts and Procurement to add the following non-encumbered amounts to the corresponding commodities in this contract.

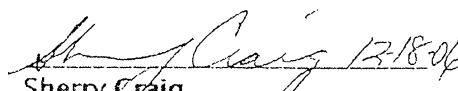
Commodity line 4:  
Indigent Legal 110-200-2900-4540-SM01 \$8,396,380.00

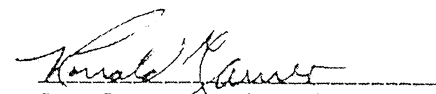
Commodity line 4:  
Indigent Legal Conflict 110-200-2900-4542-SM01 \$ 533,449.00

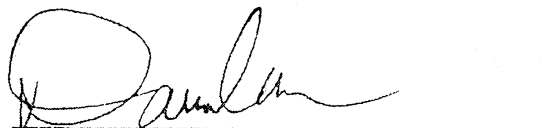
Respectfully,

  
Jean Nielsen, Director  
Human Services Department

  
Tammy Stewart, Fiscal Adm.  
Human Services Department

  
Sherry Craig,  
Contracts Manager

  
Ron Garner or designee,  
Auditor review

  
Mayor Peter Corroon or designee

12-21-06  
Date

Salt Lake County  
Government Center  
2001 South State Street  
Suite N-4300  
Salt Lake City, UT 84190-2000

801 / 468-2184  
Fax 801 / 468-2196



**SALT LAKE  
COUNTY**

**PETER M. CORROON**  
Salt Lake County Mayor

**HUMAN SERVICES  
DEPARTMENT**

"Making a positive difference"

**Jean Nielsen**  
Director Human Services

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Deputy Director Human Services

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YOUTH SERVICES

Salt Lake County  
Government Center  
2001 South State Street  
Suite N-4300  
Salt Lake City, UT 84190-2000

801 / 468-2184  
Fax 801 / 468-2196

December 17, 2007

Mayor Peter Corroon  
Salt Lake County  
2001 S State Street, Suite 2100  
Salt Lake City, UT 84190

SUBJECT: Salt Lake Legal Defenders Association Agreement for services to be rendered in 2008, **Contract SG04012C07**

Submitted for your approval is the above referenced funding request. The Salt Lake County Council has approved funding for indigent legal criminal representation with the adoption of the final budget for 2008. Please direct Contracts and Procurement to add the following non-encumbered amounts to the corresponding commodities in this contract. For questions, contact Tammy Stewart at 468-2281.

Commodity Line 6:

Indigent Legal	110-200-2900-4540-YA00	\$9,546,380
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Commodity Line 7:

Indigent Legal Conflict	110-200-2900-4542-YA00	\$533,449
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Tammy Stewart, Fiscal Administrator  
Department of Human Services

Jean Nielsen, Director  
Department of Human Services

12/19/07

Don Gray  
Contracts Administrator

12/20/07

Ron Garner or designee,  
Auditor's review

Mayor Peter Corroon or designee

12/21/07  
Date

**Joe Bryant**

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**From:** Tammy Stewart  
**Sent:** Tuesday, December 09, 2008 11:49 AM  
**To:** Joe Bryant  
**Subject:** Funding for Contract SG04012C (Legal Defender Association)

Hi Joe –

For 2009, the County Council has approved a budget of \$11,011,455 for indigent legal criminal representation provided by the Salt Lake Legal Defender Association (LDA). These services are provided under contract SG04012C.

Because the LDA's budget has two components, the regular operating budget which is \$10,383,006 and the conflict counsel budget which is \$628,449, in the past these amounts have been put in two separate commodity lines with new commodity lines being used each year. For 2008, Commodity Line 6 was used for the operating budget and Commodity Line 7 was used for the conflict counsel budget. I don't know if you need to create new commodity lines for 2009 – for me, it serves no purpose to have new lines – or if we really need to split the contract amount between two commodity lines. However, I'll work with whatever configuration of commodity lines you believe is most appropriate.

Thank you.

*Tammy Stewart*  
Human Services Fiscal Administrator  
Salt Lake County  
(801) 468-2281  
[tstewart@slco.org](mailto:tstewart@slco.org)

# **ADDENDUM 6**

FILED DISTRICT COURT  
Third Judicial District

AUG 21 2009

SALT LAKE COUNTY

Deputy Clerk

09 AUG -5 PM 12  
SALT LAKE DEPARTMENT  
BY DEPUTY CLERK

LOHRA L. MILLER (#6420)  
District Attorney for Salt Lake County  
T.J. TSAKALOS (#3289)  
JEFF THORPE (#3256)  
CRAIG WANGSGARD (#6052)  
Deputy District Attorneys  
2001 South State Street, #S3600  
Salt Lake City, UT 84190-1200  
Telephone: (801) 468-3421  
Facsimile: (801) 468-2622

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IN THE THIRD DISTRICT COURT IN AND FOR  
SALT LAKE COUNTY, STATE OF UTAH, SALT LAKE DEPARTMENT

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STATE OF UTAH

Plaintiff,

vs.

RANDY FETCH JEFFS,

Defendant.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER REGARDING  
DEFENDANT'S INDIGENT DEFENSE  
EXPENSES

Case No. 081903791  
Judge William W. Barrett

---

A hearing was held before the Honorable Judge William W. Barrett on July 13, 2008, at the hour of 1:30 P.M.. Said hearing was on Defendant's MOTION TO DECLARE DEFENDANT INDIGENT AND TO PROVIDE AN INVESTIGATOR AND EXPERT WITNESS AT STATE EXPENSE. Deputy District Attorney Craig Wangsgard represented Salt Lake County. David Drake represented defendant Randy Jeffs. Based on testimony of Randy Jeffs, review of the pleadings and other good cause appearing, this Court finds as follows:



#### FINDINGS:

1. Randy Jeffs and his spouse have two children, their house is currently in foreclosure and Mr. and Mrs. Jeffs have filed for bankruptcy protection.
2. Mr. Jeffs has been incarcerated for the last 14 months and his wife is currently unemployed.
3. Although Mr. Jeffs has paid Mr. Drake \$28,000 to represent Mr. Jeffs in this matter, the family has no other significant income or assets.
4. Salt Lake Legal Defenders Association ("LDA") is available to represent Mr. Jeffs has no conflict of interest in this matter.
5. LDA has the needed expertise and defense resources to provide an effective defense of Mr. Jeffs.
6. Although LDA was previously appointed to represent Mr. Jeffs, Mr. Jeffs chose to hire Mr. Morrison and Mr. Drake as his private counsel.

#### CONCLUSIONS OF LAW:

1. Randy Jeffs is indigent within the meaning of Utah code Ann., Sec. 77-32-202(3)..
2. There is no "compelling reason," as required by Utah Code Ann. Sec. 77-32-302(2)(e), to appoint a noncontracting attorney or defense resource.

#### ORDER

1. It is ordered that Mr. Jeffs is hereby declared indigent, but the remainder of Defendant's Motion to Declare Defendant Indigent and to Provide and Investigator and Expert Witness at State Expense is denied.
2. Salt Lake County shall have no duty or obligation to pay for an Investigator or Expert Witness for Mr. Jeffs.

DATED this 21 day of Aug, 2009.

BY THE COURT:

  
HONORABLE WILLIAM W. BARRETT  
Third District Court Judge



APPROVED AS TO FORM

\_\_\_\_\_  
David Drake  
Attorney for Defendant Randy Jeffs

CERTIFICATE OF MAILING

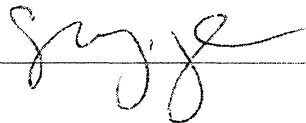
I HEREBY CERTIFY that on the 22<sup>nd</sup> day of July, 2009, I caused a true and correct copy of the foregoing ORDER to be delivered via facsimile transmission and United States first class mail, postage prepaid, to the following:

David Drake  
David Drake, P.C.  
6905 South 1300 East, #248  
Midvale, Utah 84047  
Facsimile No. (801)601-1502

Michaela Andruzzi  
Deputy District Attorney  
District Attorney's Office  
111 East Broadway, Suite 400  
Salt Lake City, Utah 84111  
Facsimile No. (801)531-4111

Patrick L. Anderson  
Salt Lake Legal Defender Association  
424 East 500 South, #300  
Salt Lake City, Utah 84111  
Facsimile No. (801)532-0330

By \_\_\_\_\_

A handwritten signature in dark ink, appearing to be "S. J. J.", is written over a horizontal line.